No. 06-1037
Title: Kentucky Retirement Systems, et al., Petitioners
v.
Equal Employment Opportunity Commission
Docketed: January 29, 2007
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (03-6437)
Decision Date: October 31, 2006
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 23 2007	Petition for a writ of certiorari filed. (Response due February 28, 2007)
Feb 23 2007	Order extending time to file response to petition to and including March 30, 2007.
Feb 27 2007	Brief amici curiae of Michigan, et al. filed.
Mar 5 2007	Brief amici curiae of National Association of State Retirement Administrators, et al. filed.
Mar 27 2007	Order further extending time to file response to petition to and including April 30, 2007.
Apr 27 2007	Order further extending time to file response to petition to and including May 14, 2007.
May 8 2007	Order further extending time to file response to petition to and including May 30, 2007.
May 30 2007	Brief of respondent Equal Employment Opportunity Commission in opposition filed.
Jun 13 2007	DISTRIBUTED for Conference of September 24, 2007.
Jun 15 2007	Reply of petitioners Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff filed. (Distributed)
Sep 25 2007	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioners' brief is filed.
Nov 5 2007	Joint appendix filed.
Nov 5 2007	Brief of petitioners Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff filed.
Nov 9 2007	Brief amicus curiae of National Association of State Retirement Administrators, et al. filed.
Nov 9 2007	Brief amici curiae of Michigan, et al. filed.
Nov 13 2007	Brief amicus curiae of National School Boards Association filed.
Nov 13 2007	Brief amici curiae of National Association of Counties, et al. filed.
Nov 16 2007	SET FOR ARGUMENT ON Wednesday, January 9, 2008.
Dec 3 2007	Brief of respondent Equal Employment Opportunity Commission filed.
Dec 6 2007	CIRCULATED.
Dec 6 2007	Record received from U.S.C.A. for the 6th Circuit. (1 binder)
Dec 10 2007	Brief amici curiae of AARP and National Employment Lawyers Association filed. (Distributed)
Dec 17 2007	Record received from the U.S.D.C. for the Western District of Kentucky. (1 box)

Dec 28 2007	Reply of petitioners Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff filed. (Distributed)
Jan 9 2008	Argued. For petitioners: Robert D. Klausner, Plantation, Fla. For respondent: Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

061037 JAN 23 2007

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff's Department,
Petitioners,

v.

Equal Employment Opportunity Commission,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition involves a public employee retirement plan that includes normal and disability retirement benefits. A member who is eligible for normal retirement benefits based on attained age plus a minimum service requirement, or based on service alone, is not eligible for disability retirement benefits. Because age may be a factor in determining eligibility for normal retirement, it is an indirect factor in determining eligibility for disability retirement. Moreover, the calculation of disability retirement benefits is based upon actual years of service plus the number of years remaining before the member reaches retirement age or eligibility based on years of service alone; age may thereby be an indirect factor in determining the amount of disability retirement benefits.

The question presented in this Petition is accordingly:

Whether any use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act?

LIST OF PARTIES

Petitioners are the Kentucky Retirement Systems, the Commonwealth of Kentucky and the Jefferson County Sheriff's Department. Respondent is the Equal Employment Opportunity Commission.

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Kentucky Retirement Systems, the Commonwealth of Kentucky, and the Jefferson County Sheriff's Department petition for a Writ of Certiorari to review the October 31, 2006 en banc Opinion of the United States Court of Appeals for the Sixth Circuit wherein the state retirement plan was found to be facially discriminatory in violation of the Age Discrimination in Employment Act.

OPINIONS BELOW

The September 4, 2003 Judgment and Order entered by the United States District Court for the Western District of Kentucky is unofficially published at *EEOC v. Jefferson County Sheriff's Department*, 2003 U.S. Dist. LEXIS 18998. It is reproduced herein in Appendix B. The Opinion of the three judge panel of the Sixth Circuit Court of Appeals which originally affirmed the Summary Judgment is reported at *EEOC v. Jefferson County Sheriff's Department*, 424 F.3d 467 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006). The October 31, 2006 en banc Opinion reversing and remanding is reported at *EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006) and is reproduced in Appendix A.

JURISDICTION

This action originated in the United States District Court for the Western District of Kentucky. The Summary Judgment entered by the trial court on September 4, 2003 was reviewed by a three judge panel of the U.S. Court of Appeals for the Sixth Circuit which entered an Opinion affirming on September 19, 2005. The Equal Employment Opportunity Commission filed a Petition for Rehearing En Banc which was granted by the court on January 4, 2006. The court entered an Opinion on October 31, 2006 reversing and remanding. This Court has jurisdiction to review the October

31, 2006 en banc Opinion of the U.S. Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254.

RELEVANT STATUTE

The focal point of the Petition is the term "arbitrary" as utilized in 29 U.S.C. § 621(b) and the impact which such qualifying term has on determining whether the challenged provisions of a retirement plan are facially discriminatory. 29 U.S.C. § 621(b) provides:

> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

STATEMENT OF THE CASE

This action was originally brought by the Equal Employment Opportunity Commission ("EEOC") against Kentucky Retirement Systems, the Jefferson County Sheriff's Department and the Commonwealth of Kentucky (collectively referred to as "Kentucky Retirement") charging that the eligibility requirements and the manner in which disability retirement benefits are calculated under the state retirement plan violate the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*. The Complaint alleged that "since at least October 16, 1992, Defendants have discriminated against a class of individuals age forty (40) or over on the basis of age by maintaining a disability retirement program which denies benefits or pays reduced benefits, because of age." The damages sought by the EEOC for the alleged violation included "back benefits with prejudgment

interest [dating back to 1992] and recalculated future benefits".

The challenged state retirement plan is a defined benefit plan which provides normal retirement benefits and disability retirement benefits from a single fund consisting of employee and employer contributions and the investment earnings on such contributions. For a hazardous duty member[1] the eligibility requirements for a normal retirement benefit consist of either (1) being fifty-five or older, and having the minimum requisite service credits or (2) having twenty years of service credit, regardless of age. The disability retirement benefit is designed to be a replacement benefit for those who become disabled before they are eligible for normal retirement. Consistent with that limited purpose, if a member is eligible for normal retirement benefits, he or she is not eligible for disability retirement benefits.

The calculation of normal retirement benefits is based upon final compensation and years of service. Disability retirement benefits are calculated in the same manner except it is assumed that the disabled member would have continued working up until retirement age. Accordingly, the years of service earned by the member are increased by imputing service years up to the member's fifty-fifth birthday or up to twenty years of service, which ever would occur first. The

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[1] There are two types of members in the system, hazardous duty members and nonhazardous duty members. The EEOC's challenge to the retirement plan was raised in the context of a hazardous duty member but extends to include nonhazardous duty provisions as well. In the interest of brevity, the parties have throughout the appellate process confined the discussion to the provisions governing hazardous duty members; there are comparable provisions which apply to nonhazardous duty members which are likewise challenged by the EEOC.

number of imputed years cannot exceed the total service the member had on his or her last day of paid employment. This imputation of service years thus results in a benefit comparable in amount to the normal retirement benefit the member would have received had he or she not become disabled.

The EEOC relied upon 28 U.S.C. §§ 451, 1331, 1337, 1343, 1345 and 29 U.S.C. § 217 to invoke the jurisdiction of the District Court and assert an ADEA challenge against the retirement plan which the EEOC maintained was facially discriminatory because age was considered as a factor in the plan. The United States District Court for the Western District of Kentucky disagreed holding: "finding a retirement policy facially discriminatory merely because age is a factor in the plan is illogical". (Appendix B, p. 43a). The court enumerated the legitimate reasons why the retirement plan included age as a factor:

> Service credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled. The credits are an attempt to provide an employee who becomes disabled before normal retirement with benefits similar to those which, had the employee been capable of continuing work through normal retirement, he would have been entitled to receive. The service credit calculation takes age into consideration because the credits are intended only to provide the disabled employee with those benefits that would have been available through normal retirement had the employee not become disabled, not to provide the disabled employee with more benefits than normal retirement would have allowed. Thus, age comes into

> play in the determination only because age is one of the factors of retirement eligibility.

(Appendix B, p. 45a - 46a).

The court further noted that holding "a retirement policy discriminatory because it calculates retirement eligibility based on age and years of service does nothing to further the purpose of the ADEA, which is to prevent employers from making employment decisions (including provision of benefits) based on denigrating stereotypes about age." (Appendix B, p. 43a).

The matter was appealed to the Sixth Circuit Court of Appeals. A three judge panel affirmed, *EEOC v. Jefferson County Sheriffs Department,* 424 F.3d 467 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006), finding the ruling of the District Court to be consistent with *Lyon v. Ohio Education Ass'n and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995). Relying on *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701 (1993) the *Lyon* court found that an early retirement plan which included an imputation of service years was not facially discriminatory. The resulting disparity was not "because of age", but rather a result of an actuarial reality:

> [T]he disparity that plaintiffs find objectionable is a product of their length of service and their age when originally hired by OEA. Thus, any disparity merely reflects the actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age of 62 (the OWBPA allows employers to fix a minimum age for early or normal retirement.).

Lyon v. Ohio Education Ass'n and Professional Staff Union, 53 F.3d 135, 140 (6th Cir. 1995).

So too herein, the three judge panel found that the eligibility requirements and the use of imputed service years did not render the retirement plan facially discriminatory. (Appendix A, p. 11a).

The EEOC filed a Petition for Rehearing En Banc which was granted by the Sixth Circuit. In an Opinion dated October 31, 2006, the Court sitting en banc partially overruled *Lyon v. Ohio Education Ass'n and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995) and held that the retirement plan was facially discriminatory because the plan "excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age" and because "employees who become disabled when they are still 'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." (Appendix A, p. 16a and 17a). The court noted that "the Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations." (Appendix A, p. 19a).

Chief Judge Boggs, joined by Judges Batchelder, Gilman and McKeague, filed a dissenting opinion. Judge Boggs found that "a careful examination of the plan shows that it considers age only in combination with years of service and years to retirement age, and is a non-discriminatory way of providing workers with protection against disability before they have had an opportunity to earn a normal pension at retirement age." (Appendix A, p. 26a). He reasoned that considering age in combination with years of service and years to retirement age in this context is not illegal under the

teachings of *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701 (1993). (Appendix A, p. 26a).

Chief Judge Boggs noted that this Court in *Hazen* explained: "'It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.' *Ibid.* 'Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.' *Ibid.*" (Appendix A, p. 27a). Chief Judge Boggs noted: "This type of stereotyping is nowhere found in the plan under consideration . . .". (Appendix A, p. 27a).

In the Dissenting Opinion, Chief Judge Boggs additionally distinguished *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 83 L.Ed.2d 523, 105 S. Ct. 613 (1985), relied upon by the Majority. At issue therein was TWA's pilot transfer policy wherein "captains who were disqualified from serving in that capacity for reasons other than age were allowed to transfer to the position of flight engineer, and in the process to 'bump' less senior flight engineers. Pilots who were going to be disqualified from continuing to serve as captains because they had reached the age of 60, however, had to resort to bidding procedures in order to become a flight engineer. . ." (Appendix A, p. 28a - 29a). Chief Judge Boggs noted that the transfer policy "implicates a stigmatizing and inaccurate stereotype—that pilots over age 60 are less capable, or at least less valuable as employees, even than younger workers who have been relieved for incompetence." (Appendix A, p. 29a). He found that "no such stereotype is implicated" in the retirement plan. (Appendix A, p. 29a). To the contrary, the plan "has nothing whatever to do with 'inaccurate and stigmatizing stereotypes' surrounding the relative ability of older employees to do the job—that is to

say, Congress's reason for enacting the ADEA . . . . There is no intimation in any part of the KRS plan of any demeaning or inappropriate stereotyping of older workers." (Appendix A, p. 36a).

Moreover, Chief Judge Boggs found the disability retirement benefit to be "a very reasonable benefit". (Appendix A, p. 33a).

> Under the KRS plan, a 'disability' retirement is intrinsically no different from the 'normal' retirement pension available to every worker. Benefits are based on years of credited service (augmented to a maximum of 20 for disabled workers ineligible for normal retirement), multiplied by a factor related to final salary. If 'normal' benefits are greater than the augmented benefits for disability, of course, the greater benefits are provided. The plan simply provides that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service.

(Appendix A, p. 33a).

Chief Judge Boggs criticized the Majority Opinion for labeling such plan facially discriminatory when the policy underlying the retirement plan "lies far from the 'essence' of the ADEA—and, in fact, does not implicate that essence at all. Age in relation to years of service performed for this employer is not the same as age qua age." (Appendix A, p. 37a).

REASONS FOR GRANTING THE PETITION

Granting the Petition for Writ of Certiorari will enable this Court to provide much needed guidance on what constitutes "arbitrary" discrimination under the ADEA and to correct the apparent misunderstanding of the Sixth Circuit Court of Appeals as well as several other Circuits that every consideration of age as a factor in a retirement plan is "arbitrary" and thereby renders such plan facially discriminatory under the ADEA.

I. A Finding of Facial Discrimination Requires a Determination that the Distinctions Drawn Under the Plan are "Arbitrary"

The analysis used by the Sixth Circuit Court of Appeals in determining whether or not the retirement plan was facially discriminatory included but one step. The court looked to whether age was considered as a factor in the plan. Finding that age, in combination with years of service and years to retirement age, was a factor in the retirement plan, the court held that the plan was facially discriminatory. Absent from this analysis is any consideration as to whether the distinctions drawn under the plan are "arbitrary". The one step analysis ignores the fact that "not all age discrimination in employment is 'arbitrary.'" *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2866 (1989).

Guidance in construing the ADEA is often taken from the Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, commonly referred to as "the Wirtz Report" which preceded the enactment of the Act. In Section 715 of the Civil Rights Act of 1964 Congress commissioned the Wirtz Report, asking the

Secretary of Labor to make recommendations "for legislation to prevent **arbitrary** discrimination in employment because of age". (emphasis added). The use of the qualifying phrase "arbitrary" was no accident. As recognized in the Wirtz Report, "'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example—race." (Wirtz Report, p. 2). It was noted that "not all discrimination in this area is 'arbitrary'" and there are circumstances where "there is in fact a relationship between his age and his ability to perform the job." (Wirtz Report, pp. 1, 2). Discrimination under those circumstances is not "arbitrary". Wirtz indeed cautioned that it would be "contrary to the public interest . . . to conceive of all age restrictions as 'arbitrary'". (Wirtz Report, p. 21).

The Wirtz Report did however find that older workers were being rejected from employment "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" (emphasis in original) (Wirtz Report, p. 2). As a result of these findings, the ADEA was drafted to prohibit older workers from being deprived of employment "on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1706 (1993). "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1706 (1993). The ADEA accordingly "commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.' *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422, 105 S. Ct. 2743, 2756, 86 L.Ed.2d 321 (1985)." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338,113 S. Ct. 1701, 1706 (1993). "The

employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338,113 S. Ct. 1701, 1706 (1993).

In accordance with the caution contained in the Wirtz Report, the ADEA does not prohibit every discriminatory act on the basis of age. To the contrary, 29 U.S.C. § 621(b) provides: "It is therefore the purpose of this chapter . . . to prohibit **arbitrary** age discrimination in employment . . . ." (emphasis added). Consistent with the Congressional directive, this Court has repeatedly defined the conduct prohibited by the ADEA in terms of "**arbitrary** discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 574, 55 L.Ed.2d 40, 98 S. Ct. 866 (1978); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120, 83 L.Ed.2d 523, 105 S. Ct. 613 (1985) (emphasis added). *See also* Justice O'Connor's concurring opinion in *Smith v. City of Jackson*, 544 U.S. 228, 161 L.Ed.2d 410, 125 S. Ct. 1536 (2005) ("The ADEA's structure confirms Congress' determination to prohibit only 'arbitrary' discrimination (*i.e.*, disparate treatment based on unfounded assumptions)." Giving due recognition to the "statutory object" "to prohibit arbitrary age discrimination in employment", *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 157 L.Ed.2d 1094, 124 S. Ct. 1236, 1242 (2004), this Court has explained that under the ADEA there are "legitimate reasons as well as invidious ones for making employment decisions on age." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 157 L.Ed.2d 1094, 124 S. Ct. 1236, 1240 (2004). Clearly where there is a legitimate reason behind an employment decision based upon age such decision is not "arbitrary" and is thus not prohibited by the ADEA.

The Sixth Circuit Court of Appeals nonetheless maintained that a determination of facial discrimination under the ADEA required but one step, i.e, establish whether the plan considers age as a factor; the court's analysis gave no consideration as to whether the reason for relying upon age was legitimate or invidious. The Sixth Circuit Court of Appeals noted that its analysis was supported by Opinions from several other circuits:

> [T]he Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations. *See Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653 (8th Cir. 2005)(stating that a retirement plan is 'discriminatory on its face' because 'it is undisputed that an employee is ineligible for early retirement benefits [under the plan] if he or she is over the age of 65'); *Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.* 374 F.3d 66, 73 (2d Cir. 2004) (finding prima facie case of age discrimination under the ADEA when age 'is the effective trigger for eligibility' for retirement policy); *Arnett v. Cal. Publ. Employees Ret. Sys.*, 179 F.3d 690, 695 (9th Cir. 1999) (recognizing prima facie disparate-treatment claim when it 'is unquestionable that the [e]mployees would have received greater disability retirement benefits but for their older ages at hire'), *cert. granted*, 528 U.S. 1111, *vacated on other grounds by Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Huff v. UARCO, Inc.*, 122 F.3d 374, 387-88 (7th Cir. 1997) (finding employer not entitled to summary judgment on disparate-treatment claim because the early retirement policy 'draws an express line between workers over fifty-five and those under').

(Appendix A, p. 19a - 20a).

Contrary to this Court's precedent, these courts ignore the requirement that the distinctions drawn for the purpose of making an employment decision must be "arbitrary" before there can be an ADEA violation. Legitimate reasons for relying on age as a factor in the decision-making process must be distinguished from invidious reasons. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 157 L.Ed.2d 1094, 124 S. Ct. 1236, 1240 (2004). Accordingly, the mere reliance upon age as a factor does not alone render the plan facially discriminatory.

II. Including Age As A Factor In a Retirement Plan Is Not Always "Arbitrary"

The simplistic reasoning that any retirement plan which includes age as a factor is facially discriminatory ignores the fact that "all retirement plans necessarily make distinctions based on age. . ." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 54 L.Ed.2d 402, 98 S. Ct. 444, 452 (1977) (concurring opinion by Justice White). Again, the issue posed by an ADEA challenge is whether the distinctions based on age are "arbitrary". There is nothing "arbitrary" about designing a plan to provide a disabled member with a replacement for the normal retirement benefits which he or she can no longer earn.

The Commonwealth of Kentucky made a commitment to the members of the state retirement plan not only to provide a normal retirement benefit, but also to provide a replacement benefit to members who due to disability are stricken from the work force before having an opportunity to earn a retirement benefit. Because age is a factor in achieving eligibility for a normal retirement benefit, it necessarily is a factor in fashioning a disability retirement benefit that is intended to provide **no more** than what the member would have received

had he or she worked until the date when eligibility for a normal retirement benefit would have been attained. Age and years of service are considered as factors in determining the amount of benefits made available to the disabled member, not because of any effort to limit the benefits available to the older members, but rather to ensure that each disabled member receives a sufficient amount of funds to replace the lost retirement benefits while at the same time preserving the financial stability of the retirement fund.

The state retirement plan is funded by contributions made by employee members and participating employers. The amount of the contributions to the fund is calculated by the plan's actuaries in accordance with generally accepted actuarial principles. These contributions and their investment earnings are the sole source of funding for both the normal retirement benefits and the disability retirement benefits.

In contrast to a defined contribution plan, providing the promised benefit under a defined benefit plan requires a careful balancing of funding considerations against the policy decision to provide adequate benefits to members who have been stricken from the workforce before having the opportunity to earn a retirement. The state retirement plan must therefore limit the availability of disability benefits which are enhanced through the imputation of service years to those who are not otherwise eligible for normal retirement benefits. It must additionally limit the amount of benefits paid out to disabled members so as to ensure that the enhancement of benefits provides no more than was originally anticipated with the normal retirement benefits. Age (in terms of eligibility for normal retirement benefits and with regard to the number of years remaining until a member is eligible for normal retirement) is thus legitimately, not arbitrarily, taken into consideration.

The Sixth Circuit Court of Appeals nonetheless relied upon *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854 (1989) and the subsequent enactment of the Older Workers Benefit Protection Act, Pub. Law 101-433 ("OWBPA") to strike down the retirement plan as being facially discriminatory. It cited an isolated sentence in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2860 (1989) ("[o]n its face, the [employee benefit] scheme renders covered employees ineligible for disability retirement once they have attained age 60") as evidence that this Court found a similar retirement plan in *Betts* to be facially discriminatory. (Appendix A, p. 18a). The Sixth Circuit noted "[i]n response to *Betts*, Congress promptly amended the ADEA to remove the need for proof of subterfuge and to clarify its intent 'to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.' Older Workers Benefit Protection Act ('OWBPA'), Pub. Law 101-433, § 101, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621)." (Appendix A, p. 18a). The court reasoned "this legislative history is compelling evidence that when revising the ADEA in response to *Betts*, Congress intended to prohibit the very sort of age-based discrimination that the original panel, bound by *Lyon*, condoned in this plan." (Appendix A, p. 19a).

The Sixth Circuit Court of Appeals clearly misread *Betts* which contains no discussion of facial discrimination and equally misunderstood the legislative history of the OWBPA. Without question the OWBPA was passed in reaction to the holding in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854 (1989). There is also no dispute that the legislative history of the Act specifically refers to *Betts* and the equal cost defense.

The quotation from the legislative history relied upon by the Sixth Circuit however must be placed in the context of the *Betts* ruling.

The issue addressed by this Court in *Betts* was not whether the retirement plan was facially discriminatory, but whether the § 623(4)(f)(2) defense was applicable. At that time 29 U.S.C. § 623(4)(f)(2) provided "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act is exempt from the prohibition of the ADEA. Betts argued that this provision protected age-based distinctions in employee benefit plans only when justified by the increased cost of benefits for older workers. The Court rejected such argument finding "[t]he requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2863 (1989). It found "construing § (4)(f)(2) to include a cost-justification requirement is contrary to the plain language of the statute and is invalid." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2865 (1989).

The Court then sought to define the meaning of the term subterfuge as used in § 623(4)(f)(2). It reaffirmed the finding in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 54 L.Ed.2d 402, 98 S. Ct. 444 (1977) that an employee benefit plan adopted prior to the enactment of the ADEA could not be a subterfuge to circumvent the prohibitions of the Act. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2862 (1989). The Court also determined that "Congress left the employee benefit battle for another day, and legislated only as to hiring and

firing, wages and salaries, and other non-fringe-benefit terms and conditions of employment." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2867 (1989). It thus construed § 623(4)(f)(2) to exempt "the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2866 (1989).

Accordingly, in order to challenge a benefit plan as a subterfuge to evade the purposes of the Act, an employee was required to prove that the challenged plan provision "actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation." *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2868 (1989). Betts was found not to have met this burden. *Public Employees Retirement of Ohio v. Betts,* 492 U.S. 158, 106 L.Ed.2d 134, 109 S. Ct. 2854, 2869 (1989).

Congress subsequently enacted the OWBPA, deleting from § 623(4)(f)(2) the reference to subterfuge and among other revisions, adding section (k) which provides: "A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan." 29 U.S.C. § 623(k). This language clearly provides that all employee benefit plans fall within the scope of the ADEA regardless of when enacted. Congress also added § 623(4)(f)(2)(B) which codified the equal cost defense. It did not however remove the term "arbitrary" from the ADEA.

The ADEA even as amended prohibits only "arbitrary" discrimination. This Court has continued to give meaning to that term after the enactment of the OWBPA. It has continued to recognize that the ADEA was enacted to address concerns "that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1706 (1993). "When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1706 (1993) (emphasis in original).

Notwithstanding the amendments contained in the OWBPA, the Court has continued to distinguish between "legitimate" and "invidious" reasons "for making employment decisions on age." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 157 L.Ed.2d 1094, 124 S. Ct 1236, 1240 (2004). Accordingly, any finding of a facial violation must necessarily include a consideration as to whether the reliance upon age as a factor is "arbitrary". "Arbitrary" must be defined in terms of the conduct the ADEA was designed to prohibit. That conduct is clearly outlined by this Court in *Hazen*. The "prohibited stereotype" described by the Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L.Ed.2d 338, 113 S. Ct. 1701, 1707 (1993) ("Older employees are likely to be ___"), played no role in the design of the retirement plan challenged herein. The reasons for the reliance on age as a factor when determining eligibility for disability retirement benefits and in calculating the amount of benefits are legitimate and therefore under the precedent of this Court belie a finding of facial discrimination.

The conclusion of the Sixth Circuit Court of Appeals that reliance upon age as a factor in the retirement plan renders the plan facially discriminatory thus conflicts with the relevant decisions of this Court and warrants review on a writ of certiorari in accordance with Supreme Court Rule 10 (c). Moreover, such review is warranted by the significant exposure to state retirement programs across the country. The retirement plan of the Commonwealth of Kentucky, with a membership of over 267,000 state and local government employees is but one of several state retirement programs which have been subjected to this challenge by the EEOC. The EEOC's exorbitant monetary demands (seeking relief back to 1992) have forced some settlements, *e.g.*, *Arnett v. California Public Employee Retirement System*, No. 95-03022 (Northern District of California) and *EEOC v. Massachusetts Public Employees Retirement System*, 99cv11233 (District of Massachusetts), but remain a threat to the financial stability of an undisclosed[2] number of other state retirement plans in addition to Kentucky Retirement Systems.

The impact of the question presented on the retirement programs of state and local government cannot be understated. The United States Census Bureau reports that there are 2,656 state and local government retirement plans covering 18 million workers and nearly 7 million retirees. Collectively, these funds have annual receipts in excess of $350 billion and total assets in excess of $2.6 trillion. *U.S. Census Bureau, The 2005 State and Local Government - Employee Retirement System Survey, Tables 1, 2 and 5a,* http://www.census.gov/govs/retire/. The effect on state and local government budgets and the retirement security of millions of American workers is substantial. If the ability to

[2] The EEOC refused to respond to discovery requests seeking identification of these other state retirement programs.

create and maintain retirement programs which provide protection for high risk workers is adversely affected, state and local governments will lack the ability to attract and retain qualified workers in critical services necessary for public safety and security.

CONCLUSION

For these reasons, Kentucky Retirement Systems, the Commonwealth of Kentucky and Jefferson County Sheriff's Department ask that this Petition for Writ of Certiorari be granted so that this Court can define what constitutes a facial violation under the ADEA in the context of a retirement plan.

Respectfully submitted on this the 23rd day of January, 2007.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-6437

[Filed October 31, 2006]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellant*,	)
v.	)
JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, and the COMMONWEALTH OF KENTUCKY, *Defendants-Appellees*.	)

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 99-00500—Jennifer B. Coffman, District Judge.

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant the Equal Employment Opportunity Commission ("EEOC") brings this public-enforcement age-discrimination lawsuit against Defendants-Appellees the Jefferson County Sheriff's Department, the Kentucky Retirement Systems, and the Commonwealth of Kentucky (referred to collectively as "KRS"), alleging that KRS's disability-retirement-benefits plan for state and county employees violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, as amended by the Older Workers Benefit Protection Act ("OWBPA"), Pub. Law 101-433, 104 Stat. 978 (1990). The KRS disability-retirement-benefits plan (hereinafter "The KRS plan") disqualifies employees who are still working from receiving disability-retirement benefits if they have already reached normal retirement-benefit age at the time they become disabled. The KRS plan also calculates disability-retirement benefits in such a way that an older employee who is eligible to receive disability benefits receives fewer benefits — in the form of lower monthly benefit payments — than a younger disabled employee receiving disability-retirement benefits who is similar to the older disabled employee in every relevant factor other than age.

Both the district court and the original panel of this court concluded that pursuant to *Lyon v. Ohio Education Association and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995), the EEOC had failed to establish a prima facie violation of the ADEA. *Lyon* concluded that a retirement plan that used age as a factor to determine benefits in a materially indistinguishable manner to the way that age is used in the KRS plan did not establish a prima facie violation of the ADEA despite the fact that older workers received lower benefits because of their age. *Lyon* held that in addition to

demonstrating disparate treatment on the basis of age, a plaintiff needed to produce evidence of discriminatory animus against older people in order to survive the employer's summary-judgment motion.

After reviewing the parties' arguments and the relevant law, we conclude that the EEOC has established a prima facie violation of the ADEA, because the KRS plan is facially discriminatory on the basis of age. Supreme Court authority on disparate-treatment-discrimination claims as well as the persuasive authority of many of the other circuits and the history of the ADEA (as amended by the OWBPA) demonstrate that KRS is not entitled to summary judgment. We further hold that when an employment policy or benefit plan such as the KRS plan is facially discriminatory, a plaintiff challenging that policy does not need additional proof of discriminatory animus in order to establish a prima facie disparate-treatment claim. Upon en banc review, we conclude that *Lyon's* standard for a disparate-treatment age-discrimination claim is inconsistent with Supreme Court authority as well as the rulings of several of our sister circuits in cases involving the similar role of age in employee-benefit plans. We therefore overrule in part our previous decision in *Lyon*.

Because we conclude that the EEOC has established a prima facie claim of age discrimination, we **REVERSE** the district court's grant of summary judgment to KRS on the EEOC's age-discrimination claim and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

The dispute that led to this lawsuit began when Charles Lickteig, who was at the time a Deputy Sheriff with the Jefferson County Sheriff's Department, was denied disability-retirement benefits under the KRS plan because of his age. Because Lickteig's job as a Deputy Sheriff was considered hazardous, Lickteig became eligible for normal retirement benefits at age 55,[1] but he chose to continue working past that date because he had school-age children to support. Joint Appendix ("J.A.") at 49 (Lickteig Aff. ¶ 11). In 1995, Lickteig, who had worked as a Deputy Sheriff since 1978, became disabled due to "a deteriorating vertebra[], arthritis, nerve damage, and Parkinson's disease" to the point that he could no longer perform his Deputy Sheriff duties. J.A. at 48 (Lickteig Aff. ¶¶ 4, 6). In July 1995, at age sixty-one and with seventeen years and seven months worth of service, Lickteig applied for disability-retirement benefits under the KRS plan. J.A. at 42 (William Hanes Aff. ¶ 3); J.A. at 49 (Lickteig Aff. ¶ 7). In a letter dated August 25, 1995, defendants notified Lickteig that his request for disability-retirement benefits had been denied because of his age. In its denial letter, KRS explained:

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[1] As the original panel of this court explained, under the KRS retirement system, "[a]n employee in a hazardous position is eligible to receive normal retirement benefits at age 55, or with twenty years of service, Ky. Rev. Stat. ¶¶ 16.576, 16.577(2), 61.592(4), 78.545(31), whereas an employee in a nonhazardous position is eligible to receive normal retirement benefits at age 65. Ky. Rev. Stat. § 61.510(18)." *EEOC v. Jefferson County Sheriff's Dep't*, 424 F.3d 467, 469 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006).

> Our laws state that you must have at least 60 months of service credit, be under age 55, and apply within 12 months of your last day of paid employment in a regular full-time position to qualify for Disability Retirement. Therefore, you are not eligible to apply for Disability Retirement since you are over age 55 and in a hazardous position.

J.A. at 51 (Lickteig Denial Letter). As a result of the denial of his request for disability-retirement benefits, Lickteig filed a charge of discrimination with the EEOC in February 1996, alleging that defendants illegally denied him the benefits because of his age. J.A. at 57-59 (EEOC Charges). The EEOC began investigating Lickteig's charges and eventually concluded that the KRS plan violated the ADEA.

The material aspects of the KRS plan are as follows. First, the KRS plan provides two types of retirement benefits — normal retirement benefits and disability-retirement benefits. Employees like Lickteig who work in hazardous positions are eligible for normal retirement benefits at age fifty-five or after completing twenty years of service, whereas an employee working in a nonhazardous position is eligible for normal retirement benefits at age sixty-five. The EEOC is not challenging the KRS plan provisions for normal retirement benefits for either class of employees, but rather only the plan's provision of disability-retirement benefits. As Lickteig is a hazardous-category employee, the district court and the original hearing panel of our court analyzed only the disability-retirement plan's impact upon employees in hazardous positions, and we do the same. We note, however, that our holding is equally applicable to KRS's treatment of employees in nonhazardous positions to the extent that the disability-retirement plan utilizes age in a materially

indistinguishable way in the provision of disability-retirement benefits to employees in nonhazardous positions.

The EEOC argues that the KRS plan's provisions of disability-retirement benefits violates the ADEA because the plan "denies benefits or pays reduced benefits, because of age." J.A. at 21 (Compl. at 1). As the original hearing panel of our court explained:

> The [KRS disability-retirement benefits] scheme appears to disadvantage older workers by virtue of the fact that a class of workers, determined in significant part by age (actually youth), gets unworked years attributed to them for purposes of calculating the amount of disability retirement. When workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits. The amount of the yearly benefits is generally calculated as 2.5% of the employee's final compensation times the number of years worked. However, for employees who are not yet eligible for normal retirement (i.e., employees under age 55 and with fewer than 20 years of service), additional years are added to the number of years worked for purposes of the calculation [of disability-retirement benefits]. The number of years added is the number of years remaining until the worker *would have* reached either normal retirement age or twenty years of service, but no more than the number of years already worked. The purpose appears to be to give a disabled worker the amount of benefit he would have been entitled to had he worked until normal retirement, notwithstanding the fact that he had not actually worked those additional years.

> Under this scheme, disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less than twenty years of service) and the same final compensation. The employee who receives normal retirement benefits will be entitled to 2.5% of his final compensation times his actual service years, whereas the employee who will receive disability retirement benefits will receive the same 2.5% of his final compensation, but will have it multiplied by a number that is higher than his actual years of service, leading to a higher benefit. Moreover, disability benefits will be greater for workers who become entitled to disability retirement at a younger age with the same number of years of service.

EEOC v. Jefferson County Sheriff's Dep't, 424 F.3d 467, 469-70 (6th Cir. 2005) (footnotes omitted), *vacated on grant of reh'g en banc* (2006).

In addition, a hazardous-category employee eligible for the disability-retirement-benefit plan who is injured in the line of duty is guaranteed monthly benefits of at least 25% of monthly final rate of pay, and if the employee has dependent children, she receives a dependent-child benefit of 10% of monthly final rate of pay for each child, up to a maximum for all dependent children of 40% of monthly final rate of pay. KY. REV. STAT. ANN. § 16.582(6). The parties do not dispute that an otherwise-identical employee who becomes disabled in the line of duty but because of her age at the time of disability is ineligible for disability-retirement benefits could not receive these additional dependent benefits.

The EEOC has provided charts demonstrating the impact of an employee's age on her disability-retirement-benefit

amount in its brief. EEOC Br. at 14, 16. These charts illustrate, and defendants do not dispute, that:

> assuming every factor, other than age, that is relevant to determine an employee's benefits (*i.e.*, type of position, disabling condition, final compensation, and length of service) is identical, the amount paid annually to a worker who retires on disability at a younger age will frequently exceed (and will never be less than) the annual benefits of a worker who retires due to disability at an older age.

EEOC Br. at 16-17. Additionally, the EEOC argues, and defendants do not dispute, that:

> In every case, a worker younger than normal retirement age (55/65) who retires on disability will receive more benefits each year than an older employee who retires from the same job, with the same disabling condition, length of service, and final compensation, who becomes disabled after reaching 55/65 and must take normal retirement.

EEOC Br. at 16.

The EEOC challenges both the 1998 and the 2000 versions of the Kentucky statute governing the KRS plan.[2] *See*

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[2] We will therefore confine our analysis to the 1998 and 2000 versions of the statute. We note, however, that the Kentucky Legislature again revised the KRS plan in 2004. The 2004 revision retained the age-based eligibility requirements of the 2000 version, but altered the calculation of disability-retirement benefits. For members beginning to participate on or after August 1, 2004, disability-retirement pay is calculated to be "the higher of twenty-

EEOC Br. at 7-8 (explaining challenged aspects of both the pre-2000 and 2000 versions of the KRS plan); *id.* at A-2 (excerpting portions of the pre-2000 and 2000 versions of the statute). The original panel explained the key differences between the 1998 and 2000 versions of the statute:

> Prior to July 2000, an employee was not eligible to receive disability retirement benefits unless he was "less than normal retirement age." Ky.Rev.Stat. § 16.582(2)(b) (1999), Ky.Rev.Stat. § 61.600(1)(b) (1999). After this litigation began, the provisions were amended, and currently provide that an employee is not eligible for retirement disability benefits if the employee is "eligible for an unreduced retirement allowance." Ky.Rev.Stat. § 16.582(2)(b) (2001) (effective July 14, 2000); *see* 2000 Ky. Acts 385, at *4. Under both versions, an employee who is 55 or older cannot receive disability retirement benefits. In addition, under the current version, an employee who became eligible to receive normal retirement benefits by virtue of having 20 years of service also could not receive disability retirement benefits.

EEOC v. Jefferson County, 424 F.3d at 469 n. 1. The EEOC explains that it is not challenging the exclusion of this latter group of employees — those rendered ineligible for disability-retirement benefits because of their years of service, rather than their age. The EEOC only "seeks relief for individuals

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five percent (25%) of the member's monthly final rate of pay or the retirement allowance determined in the same manner as for retirement at his normal retirement date with years of service and final compensation being determined as of the date of his disability." KY. REV. STAT. ANN. § 16.582(5)(b).

who, because of age, were excluded from disability retirement, or applied for disability retirement and have received fewer annual benefits, since October 16, 1992," which is the enactment date of the OWBPA. EEOC Reply Br. at 27; *see also* EEOC Br. at 34.

In the fall of 1998, the EEOC and KRS attempted to conciliate this dispute, but the parties could not reach an agreement. J.A. at 60-62 (Marcia Hall-Craig Aff.). On August 2, 1999, the EEOC filed this lawsuit in the United States District Court for the Western District of Kentucky, alleging that the KRS plan illegally discriminates on the basis of age in violation of the ADEA. J.A. at 21-23 (Compl. ¶¶ 1-12). KRS filed a motion to dismiss the suit on Tenth and Eleventh Amendment immunity grounds. After the district court denied defendants' motion to dismiss, a panel of our court affirmed that decision, holding that, with one exception, the Tenth and Eleventh Amendments do not shield KRS from the EEOC's age-discrimination suit. *EEOC v. Ky. Ret. Sys.*, 16 F. App'x 443, 453 (6th Cir. 2001). After the case was remanded to the district court, both the EEOC and KRS moved for summary judgment. The district court granted summary judgment for defendants, concluding that pursuant to our reasoning in *Lyon*, discriminatory intent was necessary to establish a prima facie case of age discrimination in a disparate-treatment claim. J.A. at 32-33 (Dist. Ct. Op. at 4-5). The district court recognized that intent could be inferred from a facially discriminatory policy, but found that the KRS plan was not facially discriminatory, and thus concluded that the EEOC had not alleged a valid disparate-treatment ADEA claim. The EEOC filed a timely notice of appeal.

Although suggesting concerns regarding the soundness of *Lyon's* reasoning, the original hearing panel of our court deemed itself bound by the *Lyon* decision and affirmed,

holding that "[b]ecause the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan [held to be consistent with the ADEA] in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA." *EEOC v. Jefferson County*, 424 F.3d at 473. The EEOC petitioned for rehearing en banc, arguing that the KRS plan is facially discriminatory, and that the Commission has therefore established a prima facie claim of age discrimination. The EEOC also urges us to overrule *Lyon* to the extent that *Lyon* holds that a plaintiff challenging a facially discriminatory employment policy must have proof that the policy was motivated by discriminatory animus against older workers in order to state a prima facie violation of the ADEA.

II. ANALYSIS

We begin with a discussion of the origins of the ADEA, as the history of the Act informs our analysis of the issues raised in this case. Congress considered including age as a protected class when it was debating and drafting Title VII of the Civil Rights Act of 1964, but declined to do so because of concerns that employers might sometimes have a legitimate basis for making age-related employment decisions. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587-88 (2004). In order to determine whether Congressional action to address age discrimination was necessary and to understand better what type of legislation might remedy the existing problems, Congress requested that then-Secretary of Labor Willard Wirtz conduct "a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005) (quoting

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964)).

The Secretary of Labor's report, submitted to Congress in June 1965, concluded that age discrimination was sufficiently widespread that it warranted public concern, but that the nature of age discrimination was quite different from discrimination based upon the classes protected by Title VII. U.S. SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5-6 (June 1965), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 22-23 (1981) (hereinafter "Wirtz Report"). "Because the ADEA was modeled on the Wirtz Report's findings and recommendations, the Report provides critical insights into the statute's meaning." *Smith*, 544 U.S. at 254 (O'Connor, J., concurring in the judgment). The Wirtz Report concluded "that there was little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits." *Id.* at 232 (majority opinion). The Report stated that it had "found no evidence of prejudice based on dislike or intolerance of the older worker," and that "intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers." Wirtz Report at 6. Despite finding a lack of discriminatory animus against older people, Secretary Wirtz found "substantial evidence of arbitrary" age discrimination. *Id.* at 5. Secretary Wirtz defined arbitrary[3] age discrimination as

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[3] The Supreme Court has largely adopted the Wirtz Report's definition of "arbitrary" age discrimination in its ADEA jurisprudence. In *General Dynamics Land Systems, Inc. v. Cline*,

"assumptions about the effect of age on [an employee's] ability to do a job *when there is in fact no basis for these assumptions.*" *Id.* at 2. The Report explains that a common form of arbitrary age discrimination at that time was the refusal of employers to hire individuals for positions once they had reached a certain age, without any actual relevance to the particular position's job requirements. *Id.* at 6-8.

The Wirtz Report inspired Congress to request that the Secretary draft proposed legislation to combat age discrimination, and after that was completed, Congress "acted favorably on his proposal" and enacted the ADEA. *Smith,* 544 U.S. at 232-33. In 1967, Congress enacted the ADEA, which now renders it "unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;" as well as "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

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the Court stated that the ADEA's terms "arbitrary limits" and "arbitrary age discrimination" "are unmistakable references to the Wirtz Report's finding" that age ceilings in hiring were at the time widespread. 540 U.S. at 590. "The ADEA's ban on 'arbitrary limits' thus applies to age caps that exclude older applicants, necessarily to the advantage of younger ones." *Id.* Similarly, in her concurrence in *Smith v. City of Jackson,* Justice O'Connor read the Wirtz Report's definition of "arbitrary" as "clearly equat[ing] with disparate treatment" and as treatment on the basis of age that is "intentional and unfounded." *Smith,* 544 U. S. at 255 (O'Connor, J., concurring in the judgment).

status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(l)-(2).

In this case, the EEOC urges us to conclude that it has established a prima facie claim of age discrimination because the KRS plan facially discriminates against older employees in two ways: (1) the KRS plan renders employees ineligible for disability-retirement benefits simply because of their age, which means that disabled workers who are ineligible for disability benefits because of their age receive lower (normal) retirement benefits than otherwise-similar younger workers who become disabled and are able to receive the greater disability-retirement benefits, and (2) the KRS plan uses an employee's age in order to calculate disability-retirement benefits in such a way that an older eligible employee receives lower monthly disability-benefit payments than an otherwise-similar younger disabled worker.

Defendants argue that, contrary to the EEOC's assertion, the KRS plan does not violate the ADEA because the policy does not discriminate "because of age." KRS Br. at 10. Rather, defendants argue, the KRS plan merely uses age as one of several factors to determine benefits, in the same way that age is a factor in many, if not most, retirement-benefit plans. *See* KRS Br. at 13. Defendants also assert that a valid disparate-treatment claim requires a plaintiff to establish proof of discriminatory motive, and that "[t]here is no evidence that the [KRS plan] framework established to provide benefits to disabled members of Kentucky Retirement was in any fashion age-driven." KRS Br. at 26-27.

We consider first the EEOC's argument that it has established a prima facie ADEA claim because the KRS disability-retirement-benefits plan is facially discriminatory. We then assess KRS's argument that even if the KRS plan is

facially discriminatory, the EEOC must produce evidence that the plan was motivated by discriminatory animus against older people in order to sustain its prima facie burden.

A. The EEOC Has Established a Prima Facie ADEA Claim Because the KRS Plan Facially Discriminates on the Basis of Age

The Supreme Court has made clear that an employer's reliance "upon a formal, facially discriminatory policy requiring adverse treatment of employees with that [protected] trait" establishes a prima facie disparate-treatment claim under the ADEA. *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993) (citing *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985)). In *Thurston,* the plaintiffs were pilots who became disqualified to continue serving in the position of captain when they reached age sixty. Unlike individuals who became disqualified from serving as captain for reasons other than age, the plaintiffs were not granted the privilege of automatically transferring to the position of flight engineer. Instead, former captains who became disqualified from continuing in the position of captain because of their age could obtain only a flight engineer position if they were successful in a bidding process.

A unanimous Court stated that even though the airline was not required to provide transfer privileges to any disqualified captains, "if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of their age." *Thurston,* 469 U.S. at 120-21. *Thurston* held that the plaintiffs had established a prima facie case of age discrimination because "there is direct evidence that the method of transfer available to a disqualified captain depends upon [the captain's] age. Since it allows captains who become disqualified for any

reason other than age to 'bump' less senior flight engineers, TWA's transfer policy is discriminatory on its face." *Id.* at 121. *See also City of Los Angeles, Dep't of Water & Power v. Manhart,* 435 U.S. 702, 715-16 (1978) (finding facial sex discrimination in violation of Title VII where female employees are required to make larger pension contributions than their male counterparts).[4]

When we apply the definition of facial discrimination established by the Court in *Hazen Paper, Thurston,* and *Manhart* to the present dispute, it is apparent that the KRS plan is facially discriminatory on the basis of age in at least two ways. First, like the transfer plan in *Thurston,* the KRS plan categorically excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age. In order to be eligible for disability-retirement benefits, employees in hazardous positions must become disabled before they reach age fifty-five. There is absolutely no dispute that under the KRS plan, when such an employee becomes disabled at age fifty-five or older, that older employee is adversely treated because of his or her age when compared to a disabled coworker who is similarly situated in all relevant aspects other than age. On its face, this age-eligibility aspect of the KRS plan mandates disparate treatment of disabled employees on the basis of age. Defendants' decision to render employees in hazardous positions ineligible for disability-retirement benefits simply

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[4] Interestingly, the Supreme Court in *Manhart* rejected the defendant's argument that plaintiffs must produce actuarial evidence that the facially discriminatory policy actually had a discriminatory effect on women as a class, and held that the absence of this effect-evidence did not defeat plaintiffs' successful disparate-treatment claim based upon the facially discriminatory nature of the policy. *Manhart,* 435 U.S. at 716.

because they have reached normal retirement age is "a formal, facially discriminatory policy" that discriminates on the basis of age, which is sufficient to establish a prima facie ADEA violation. *Hazen Paper,* 507 U.S. at 610.

The KRS plan is facially discriminatory in a second way, in that KRS employees who become disabled when they are still "young enough" to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age. KRS does not dispute that its plan pays lower disability-retirement benefits to an older worker who, apart from age, is similarly situated to a younger worker in all relevant respects. An employee's age, therefore, "actually play[s] a role in" and has "a determinative influence on the outcome" of the amount a disabled employee's disability-retirement-benefit payment is each month. *Hazen Paper,* 507 U.S. at 610. This is a second way that the KRS plan, on its face, requires disparate treatment on the basis of age. *See id.* at 609 (stating that disparate treatment occurs when "[t]he employer simply treats some people less favorably than others because of their" protected trait) (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335-36 n.15 (1977)).

The district court's conclusion, compelled by *Lyon*,[5] that the KRS plan does not facially discriminate on the basis of age is also contrary to the Supreme Court's analysis in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989). The KRS plan's disqualification of employees age fifty-five and over for disability benefits closely resembles the characteristic of the plan in *Betts* that the Supreme Court found to be facially discriminatory. *See id.* at 166 (finding that "[o]n its face, the [employee benefit] scheme renders covered employees ineligible for disability retirement once they have attained age 60," but holding that the employer met an exemption under the ADEA because plaintiffs did not provide evidence of "subterfuge"). In response to *Betts*, Congress promptly amended the ADEA to remove the need for proof of subterfuge and to clarify its intent "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Older Workers Benefit Protection Act ("OWBPA"), Pub. Law 101-433, § 101, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621).

The original panel in this case considered *Betts* and the legislative history of the OWBPA. *EEOC v. Jefferson County*,

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[5] Although *Lyon* involved a challenge to the use of age in the determination of the amount of early retirement benefits, we agree with the original hearing panel in this case that the role that age played in the plan at issue in *Lyon* "is not materially distinguishable" from the role that age plays in the KRS plan. *EEOC v. Jefferson County*, 424 F.3d at 471. Both plans compute the disputed benefits in such a way that the employee's age is the determinative factor in the calculation of the benefit amount, with an older employee receiving lower benefits than an otherwise-similar younger employee. *Id.*

424 F.3d at 474-75. Nevertheless, the original panel ultimately determined that it was unable to distinguish *Lyon* on that ground because the same legislative material was available to the *Lyon* panel. *Id.* (citing, *inter alia,* excerpts of the final debate about the OWBPA stating that "[t]he bill provides that workers who are on disability cannot be forced to receive only their pension at retirement age" and that under the OWBPA, "they will receive the difference between what is typically a lower pension benefit and the higher disability benefit"). We believe that this legislative history is compelling evidence that when revising the ADEA in response to *Betts,* Congress intended to prohibit the very sort of age-based discrimination that the original panel, bound by *Lyon,* condoned in this plan.

That many of our sister circuits have reached conclusions contrary to *Lyon* lends further support for our conclusion that *Lyon's* definition of a prima facie ADEA claim can no longer stand. Since *Lyon* was decided, the Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations. *See Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.,* 421 F.3d 649, 653 (8th Cir. 2005) (stating that a retirement plan is "discriminatory on its face" because "it is undisputed that an employee is ineligible for early retirement benefits [under the plan] if he or she is over the age of 65"); *Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.,* 374 F.3d 66, 73 (2d Cir. 2004) (finding prima facie case of age discrimination under ADEA when age "is the effective trigger for eligibility" for retirement policy); *Arnett v. Cal. Pub. Employees Ret. Sys.,* 179 F.3d 690, 695 (9th Cir. 1999) (recognizing prima facie disparate-treatment claim when it "is unquestionable that the [e]mployees would have received greater disability retirement benefits but for their older ages at hire"), *cert. granted,* 528 U.S. 1111, *vacated on other grounds by Kimel v. Florida Bd.*

of Regents, 528 U.S. 62 (2000); *Huff v. UARCO, Inc.*, 122 F.3d 374, 387-88 (7th Cir. 1997) (finding employer not entitled to summary judgment on disparate-treatment claim because the early retirement policy "draws an express line between workers over fifty-five and those under").

We conclude that the KRS plan is facially discriminatory on the basis of age, and thus we hold that the EEOC has established a prima facie violation of the ADEA.

B. The EEOC Need Not Provide Additional Proof of Discriminatory Animus, As Discriminatory Intent Is Evidenced by the Facially Discriminatory Nature of the KRS Plan

KRS argues that defendants are entitled to summary judgment because the EEOC has not provided any proof that KRS enacted the disability-retirement-benefits plan because of a discriminatory animus against older workers. Unfortunately for KRS, this argument runs contrary to Supreme Court authority and the history and purpose of the ADEA. Once a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee "because of" the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself. As the Supreme Court held in *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991), a plaintiff who has identified a facially discriminatory employment policy need not provide evidence of discriminatory animus to prevail on a disparate-treatment claim. *Johnson Controls* explained:

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment

> practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.

The Supreme Court reaffirmed this approach in *Hazen Paper*, stating that evidence of intent to discriminate necessary for a disparate-treatment claim "can in some situations be inferred from the mere fact of differences in treatment." 507 U.S. at 609 (internal quotation marks omitted). *See also Jankovitz*, 421 F.3d at 653 (concluding that because retirement plan is facially discriminatory on the basis of age, "intent to discriminate can be presumed"); *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 119 (3d Cir. 1983) (stating that "where an employer's policy or practice is discriminatory on its face, it is unnecessary for the plaintiff to make a separate showing of intent to discriminate.")

As it was bound by *Johnson Controls* and *Hazen Paper*, the *Lyon* panel at one point correctly recognized that intent to discriminate can be inferred from a defendant's knowledge of a disparate effect. *See Lyon*, 53 F.3d at 139 (stating that plaintiffs have not "alleged that [defendants were] aware of a disparate effect on older employees, such that we could infer intent from knowledge."). *Lyon* later uses language, however, that contradicts not only this earlier recognition but also the above Supreme Court precedent.[6] *See id.*

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[6] The language in *Hazen Paper* upon which defendants, the district court, and the panel in *Lyon* appear to rely for their belief that additional proof of discriminatory motive is required is *Hazen Paper's* statement that "a disparate treatment claim cannot succeed unless the employee's protected trait *actually played a role in* [the employer's decision-making process] and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S. at 610

("Plaintiffs try to cure their lack of evidence of *intent* by inferring discriminatory animus on the basis of a disparate *effect* on older workers. This is circular, and would render meaningless the carefully-wrought distinction between disparate-impact and disparate-treatment theories of discrimination . . . ."). The original hearing panel in this case suggested persuasively that discriminatory "[i]ntent arguably should be inferred from the employer's knowledge concerning its own [retirement] plan," but continued that "[s]uch an argument is, however, foreclosed by *Lyon*." *EEOC v. Jefferson County*, 424 F.3d at 473. The panel continued in its criticism of *Lyon*, explaining why *Lyon's* requirement that a plaintiff alleging disparate treatment must produce additional evidence of a defendant's discriminatory animus where the challenged employment action consists of a benefits plan is misguided because "the only action that will ever be taken in cases involving retirement plans—as opposed to individual adverse actions—is the action of writing the policy." *Id.* We agree, and we hold that an employer's

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(emphasis added). A closer analysis of *Hazen Paper* belies defendants' argument. Immediately before making this statement, the Court in *Hazen Paper* gave examples of ways in which the protected trait could actually motivate an employer's decision and therefore constitute disparate treatment. With citations to its previous decisions in *Thurston* and *Manhart*, the Court gave as its first example "a formal, facially discriminatory policy requiring adverse treatment of employees with that [protected] trait." *Id.* It is therefore evident that the *Hazen Paper* language that defendants and *Lyon* cling to in an attempt to argue that *Hazen Paper* added an additional requirement of discriminatory animus was simply the Court's summary statement to describe the various circumstances that can constitute intentional action sufficient to support a viable disparate-treatment claim.

intent to discriminate is directly evidenced by the employer's writing or adoption of a facially discriminatory employment policy.

Finally, KRS's argument that the only disparate treatment on the basis of age that the ADEA was designed to remedy is disparate treatment motivated by discriminatory animus against the old is nonsensical considering the origins of the ADEA. The Wirtz Report, which inspired Congress to enact the ADEA, found "no evidence of prejudice based on dislike or intolerance of the older worker." Wirtz Report at 6. Despite the absence of discriminatory animus against older workers, Congress enacted the ADEA to fight arbitrary age discrimination, which Secretary Wirtz defined as age-based assumptions that lacked a basis in fact. *Id.* at 2. Thus for KRS's interpretation of the Act to be correct, it would mean that in passing the ADEA, Congress intended to prohibit only a type of age discrimination that it had been advised did not exist. We will not interpret the ADEA so narrowly and illogically.

There is simply no dispute that under the KRS plan, an employee's age actually plays a role in the defendants' decision-making process about what amount, if any, of disability-retirement benefits an employee receives, and that age therefore has a "determinative influence on the outcome" for the disabled older employee. *Hazen Paper,* 507 U.S. at 610. The KRS plan excludes hazardous-category employees age fifty-five and over from receiving disability-retirement benefits, and pays reduced benefits to older eligible disabled workers compared to their younger counterparts because of their age. The EEOC has established a prima facie ADEA claim.

III. CONCLUSION

The EEOC has established a prima facie case of age discrimination because it has demonstrated that the KRS plan facially discriminates on the basis of age. No evidence of discriminatory animus is needed, as intent to discriminate on the basis of age is directly evidenced by the facially discriminatory nature of the KRS plan. We **REVERSE** the district court's grant of summary judgment to defendants and **REMAND** to the district court for further proceedings consistent with this opinion.

CONCURRENCE

ROGERS, J., concurring separately. I concur in the result, generally for the reasons expressed in the majority opinion. The following four concerns, however, prevent my concurring in that opinion.

First, the retirement plans at issue in this case discriminate in only one way rather than two. The majority's description of the first way in which the KRS plan discriminates is significant only as it constitutes a part of the second way. That is, it is not facial discrimination to give older workers one kind of retirement plan and younger workers the same plan with a different name. The only real difference between disability retirement and normal retirement is the one caused by the "second" discriminatory characteristic. That is, if the retirement plans were called by the same name, there would be no age discrimination other than that arising from the attribution of unworked years (or more unworked years) based on age. If that discrimination were cured, on the other hand, the "first" way in which the KRS plan discriminates would be semantic only.

Second, in my view it is unnecessary for the en banc court to characterize the panel opinion's treatment of our court's opinion in *Lyon*. The panel opinion, available as it is in the Federal Reporter, speaks for itself, and in any event the panel opinion has been vacated.

Third, it is only necessary for us to overrule *Lyon* to the extent that *Lyon* is inconsistent with our en banc holding and reasoning. I would leave to future litigants the task of going through *Lyon* and identifying what survives and what does not.

Finally, we should make clear that in this case we take no position on whether the result in *Lyon* can be supported by the early-retirement exception to ADEA liability, 29 U.S.C. § 623(f)(2)(B)(ii). The district court in *Lyon* granted summary judgment in favor of the defendants after finding that the plaintiffs had failed to establish a prima facie disparate-treatment claim and, alternatively, that the retirement plan at issue constituted a lawful early retirement incentive plan pursuant to § 623(f)(2)(B)(ii). 53 F.3d at 137. Our court in *Lyon* did not reach the latter issue because it agreed with the district court regarding the plaintiffs' prima facie case. *Id.*

DISSENT

BOGGS, Chief Judge, dissenting. The majority concludes that the disability-retirement plan of the Jefferson County Sheriff's Department, Kentucky Retirement Systems, and the Commonwealth of Kentucky (collectively referred to as "KRS") amounts to a facial violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, as amended by the Older Workers Benefits Protection Act ("OWBPA"), P. Law 101-433, 104 Stat. 978

(1990). I believe that a careful examination of the plan shows that it considers age only in combination with years of service and years to retirement age, and is a non-discriminatory way of providing workers with protection against disability before they have had an opportunity to earn a normal pension at retirement age. It therefore is not illegal under the Supreme Court's precedent in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), and I respectfully dissent.

Congress stated that the purpose of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). 29 U.S.C. § 623(a)(1) prohibits an employer from, *inter alia*, "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[1]

The Supreme Court has noted that the ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985) (internal quotation marks and citation omitted). In discussing the ADEA in *Hazen Paper*, the Supreme Court emphasized the distinction between the disparate treatment and disparate impact theories of employment discrimination. 507 U.S. at 609. The Court stated that under a disparate treatment theory, "[t]he employer simply treats some people

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[1] "[C]ompensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. § 630(l).

less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . ." *Ibid.* (second alteration and ellipsis in original) (internal quotation marks omitted) (quoting *Teamsters v. United States,* 431 U.S. 324, 335-36 n.15 (1977)).

The Court continued that "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper,* 507 U.S. at 610. The employer "may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait," *ibid.* (citing *Thurston, supra,* and *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 704-18 (1978)), or "may have been motivated by the protected trait on an ad hoc, informal basis." *Ibid.* "Whatever the employer's decisionmaking process," the Court noted, "a disparate treatment claim cannot succeed unless the employee's *protected trait actually played* a role in that process and *had a determinative influence on the outcome." Ibid.* (emphases added).

Defined in that way, the Court added, disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Ibid.* "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Ibid.* This type of stereotyping is nowhere found in the plan under consideration today.

In *Hazen Paper,* the Court addressed the question of whether an employer's firing an employee whose pension was shortly to vest violated the ADEA where the vesting of the pension was based exclusively on years of service. The Court held that although pension status is typically correlated with age, and although it is perhaps true that "older employees of Hazen Paper are more likely to be 'close to vesting' than younger employees," age and years of service were nevertheless analytically distinct. If the employer fired the employee because of pension status, not because of age, "[t]he prohibited stereotype ('Older employees are likely to be _____') would not have figured in this decision, and the attendant stigma would not ensue." Such conduct would not violate the ADEA, the Court held. 507 U.S. at 611-12. (The Court ultimately remanded for a determination of whether the firing had in fact been based on age rather than on years of service. *Id.* at 613.) In short, the Supreme Court held that, under the ADEA, companies could make a decision based solely on the need to save money, even if that decision bore more heavily, on average, on older workers, so long as the factor relied on was only correlated with age, not determined by age. In our case, with much less base motives, the KRS plan is impacted by age only in relation to years of service and years remaining until normal retirement age, as shown by the examples given on pages 16 and 17, *infra.*

Thurston, an ADEA case cited by the Supreme Court in *Hazen Paper* as one in which the employer's formal, facially discriminatory policy showed intent to discriminate against older employees because of their age, fits comfortably within the "very essence" of the ADEA as discussed by the Court in *Hazen Paper.* In *Thurston,* TWA had adopted a policy by which captains who were disqualified from serving in that capacity for reasons other than age were allowed to transfer to the position of flight engineer, and in the process to

"bump" less senior flight engineers. Pilots who were going to be disqualified from continuing to serve as captains because they had reached the age of 60, however, had to resort to bidding procedures in order to become a flight engineer, and if the procedures did not result in a flight engineer position, the captain had to retire at 60. 469 U.S. at 115-17, 120. Under the TWA policy, the following results would obtain. Captain A is disqualified from continuing to serve as captain because he is found to be incompetent. Captain B is nearing age 60. They are otherwise similarly situated. Captain A is allowed to transfer to the position of flight engineer and bump less-senior flight engineers in the process, *id.* at 117; Captain B is not. The Court found that the policy, under which "the method of transfer available to a disqualified captain depends upon his age," was "discriminatory on its face," and therefore amounted to direct evidence of age discrimination in violation of the ADEA. *Id.* at 121-22. The *Thurston* case is thus an example of a forbidden policy that, in fact, implicates a stigmatizing and inaccurate stereotype—that pilots over age 60 are less capable, or at least less valuable as employees, even than younger workers who have been relieved for incompetence.

TWA's policy clearly embodied the "essence" of what the ADEA sought to prohibit—that is, arbitrary age discrimination. That is not the case with the KRS disability-retirement plan, nor was it the case with the early-retirement policy in *Lyon v. Ohio Education Ass'n and Prof'l Staff Union*, 53 F.3d 135 (6th Cir. 1995). Here, and in *Lyon*, no such stereotype is implicated.

The majority contends that there are two ways in which the KRS plan facially discriminates against older employees. First, workers with less than 20 years of service time (for

employees in hazardous positions[2]) who become disabled before a certain age (in the case of employees in hazardous positions, 55) receive additional credit toward retirement, while those over normal retirement age do not receive additional credits (that is, their years to normal retirement age is zero). Second, a disabled worker with fewer years remaining until retirement age may receive fewer additional credits than a worker with more years remaining.[3] But the calculations for determining disability benefits for workers who become disabled under age 55 and for normal retirement benefits for those over age 55 are the same, with the exception of the imputed years added to the former's service time.

The original panel succinctly describes how the KRS plan works:

> When workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits. The amount of the yearly benefits is generally calculated as 2.5% of the employee's final

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[2] I follow the convention of the parties, the original panel, and the majority of this en banc court, by referring to the KRS plan for employees in hazardous positions, although the analysis applies to the plan for employees in nonhazardous positions as well.

[3] "*May* receive" for two reasons: first, as shown below at pages 16 and 17, a younger worker may only need the same number of years for maximum benefits as an older worker (e.g., in the case of a 40-year-old with 15 years of service and a 50-year-old with 15 years of service), and second, additional credit is limited to the number of years already worked. Thus, a 49-year-old with six service years and a 40-year-old with six service years will each get the same benefit—six additional years of credit.

> compensation times the number of years worked. However, for employees who are not yet eligible for normal retirement (i.e., employees under age 55 and with fewer than 20 years of service), additional years are added to the number of years worked for purposes of the calculation. The number of years added is the number of years remaining until the worker *would have* reached either normal retirement age or twenty years of service, but no more than the number of years already worked.

EEOC v. Jefferson County Sheriff's Dep't, 424 F.3d 467, 469 (6th Cir. 2005) (footnote omitted), *vacated on grant of reh'g en banc*, 2006 U.S. App. LEXIS 258 (6th Cir. Jan. 4, 2006). The majority argues that because older employees with, e.g., 10 years of service and final pay of $50,000 receive fewer benefits than younger employees with the same years of service and final pay, the KRS plan is facially discriminatory. Yet the majority misses the point that a 53-year-old employee who becomes disabled is not similarly situated to a 33-year-old employee who becomes disabled, even if they have the same service years and final pay at the time of disability. All else being equal, the non-disabled 33-year-old of course has more years to work and live than does a non-disabled 55-year-old. *See Lyon*, 53 F.3d at 137, 140-41 (explaining that an early-retirement plan that "ensure[s] early retirees the same benefits that they would have received had they continued to work until their normal retirement date" did not pay older workers lower benefits *because of age;* two employees of different ages but equal years of service are not similarly situated). Here, the number of years of additional work credit lost is a factor related to, but not determined by, age.

In *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), the Supreme Court confronted a disability-

retirement plan that provided age-and-service retirement benefits to those who retired over a certain age (for Betts, the plaintiff, the retirement age was 60) and had a certain number of service years, or to those under the age who had served a set higher number of years. The plan also provided disability benefits to those under the retirement age who had served a certain number of years and suffered a disability. 492 U.S. at 162. The scheme in *Betts* provided that disability payments would constitute not less than 30% of the disability retiree's final average salary; no such floor existed for age-and-service retirees. Betts became disabled at age 61, and therefore was unable to receive disability benefits. She received in age-and-service benefits just over half what she would have received in disability. *Id.* at 163.

The Supreme Court stated that "[o]n its face, the . . . scheme renders covered employees ineligible for disability retirement once they have attained age 60." Yet the Court found that the scheme did not violate the ADEA because it fit under the then-existing provision of 29 U.S.C. § 623(f)(2) that exempted age-based decisions taken pursuant to the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA. *Id.* at 161-62, 166. A year after the Supreme Court's decision in *Betts,* Congress passed the OWBPA, amending the ADEA. The OWBPA included a finding that "as a result of *[Betts],* legislative action is necessary to restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employment benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." OWBPA, Pub. L. No. 101-433, § 101, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621 note).

In contradistinction to the plan at issue in *Betts*, the case the OWBPA was designed to overturn, the KRS plan does not provide younger workers with a specific benefit unavailable to older workers. In *Betts*, the crucial distinction was that a "disability" retirement gave a worker a guaranteed minimum income of 30% of the worker's final salary. Betts was disqualified from receiving that benefit solely on the basis of age, though she was qualified in every other respect. *Betts*, 492 U.S. at 162-63.

Under the KRS plan, a "disability" retirement is intrinsically no different from the "normal" retirement pension available to every worker. Benefits are based on years of credited service (augmented to a maximum of 20 for disabled workers ineligible for normal retirement), multiplied by a factor related to final salary. If "normal" benefits are greater than the augmented benefits for disability, of course, the greater benefits are provided. The plan simply provides that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service.

This is a very reasonable benefit, and one that a younger worker, in particular, would be more likely to value more highly than a newly-hired older worker, who would be more likely to have acquired other benefits from more extensive earlier employment. The extensive questioning by this court at oral argument, attempting to probe for a way to provide this sensible result under the appellants' reasoning, shows that we should not be too quick to assume that Congress intended, or commanded by the language it wrote, that such a reasonable plan was being outlawed.

It is worth repeating that the plaintiff here, Mr. Lickteig, is already eligible for "normal" retirement benefits, based on his 17 years of service and his having attained the normal retirement age (55 for employees in hazardous jobs). What he (or rather, what the EEOC on his behalf) is attempting to do in this suit is to prevent employees who have been granted a form of insurance against disability at a pre-retirement age from obtaining that benefit.

Several examples show how the KRS plan does not differentiate based on age, but on age only in relation to years of service.

1) Take two employees of the same age. One is 48 with 10 years of service, the other is 48 with 15 years of service. They both become disabled. The first employee gets 7 years of extra credit, which takes him to age 55, and the second gets 5 years of extra credit, which takes him to 20 years of service, but in each case it is as if the employee had worked until eligible for normal retirement.

2) Take two employees with the same service. One is 50 with 15 years of service. The second is 35 with 15 years of service. They both become disabled. They each get exactly the same additional credit - 5 years - despite the difference in their ages, and with that additional credit, it is as if each had worked until eligible for normal retirement.

3) Take two employees with differing ages and years of service. The first is 45 with 10 years of service. The second is 40 with 17 years of service. They both become disabled. This time, the older worker actually gets a greater benefit because he will get credit for all of the 10 years that would bring him to the retirement age, whereas the younger worker

will "max out" at the full 20 years of credit with only an additional 3 years of credit.

These examples demonstrate starkly that age is not a controlling variable in the operation of the KRS plan. They also show that the plan provides in practice exactly what was claimed for it by appellees' counsel in the argument before us: a way to insure against disability that is sensitive to the greatest loss caused by disability—the inability to continue earning credits toward retirement at a normal retirement age.

Many life insurance policies have a feature that if premiums are paid from the inception of the policy to age 65, no further premium payments are required. Some also have a feature called "disability waiver of premiums": if the policy holder becomes disabled, the insurance company will no longer collect premiums, in effect crediting the policyholder as though those premiums are being paid. Yet, on average, such a disability feature (which no one would contend constitutes age discrimination) works exactly like the KRS plan. The waiver feature is worth more to the person who is disabled at 40 than one who is disabled at 60, because, on average, the waiver is in effect for many more years. And one who is disabled after 65 receives no benefit at all, as the premium is already fully paid up.

It is undisputed, and patently obvious from the nature of the KRS plan, that both the rationale and the effect of that plan is to insure that all employees have a reasonable prospect of employer-sponsored insurance against a disability that occurs before retirement income becomes available. On average, if employee A is younger than employee B and both suffer the same disability at the same time, A 1) will have had less time to earn money and retirement credit, and 2) will have more years to live. The KRS plan is meant to, and does,

ameliorate exactly the ways in which A and B are not similarly situated, by providing A with a "bonus" for the circumstances of the disability. That "bonus" depends on years of service and years to normal retirement age. The bonus will often, but not always, be larger for a younger worker than an older one. As the examples show, the bonus provided to employees who become disabled can vary from no additional credit to as much as 10 years' credit, in a fashion that may be correlated (just as pension status in *Hazen Paper* was correlated) with age, but far from perfectly.

The KRS plan has nothing whatever to do with "inaccurate and stigmatizing stereotypes" surrounding the relative ability of older employees to do the job—that is to say, Congress's reason for enacting the ADEA, as the discussion above and the majority's own analysis of the legislative history indicate (Maj. Op. pp. 6—7). There is no intimation in any part of the KRS plan of any demeaning or inappropriate stereotyping of older workers. All employees who are considered disabled under the KRS plan are equally unable to do their jobs—because of disability. The only factor resembling consideration of the nature of aging that counsel for appellants could adduce at oral argument was that some older employees might wish to work beyond normal retirement age (55 for hazardous employees, 65 for nonhazardous employees). But that does not differentiate between workers who are now more advanced in years and those younger. All such workers may wish to (and, had they not become disabled, might have been able to) work beyond that normal retirement age. But any retirement plan must have criteria for qualification, and using age as one of the criteria has never been thought to violate the ADEA. If KRS changed the plan to have a later retirement age, the mathematics of some of the computations would change, but the aspect being attacked here would remain. Thus, it is clear

that impermissible stereotyping had nothing to do with the age-correlated features of the plan that are involved here.

Under the KRS plan, the employee's age *in relation to his years of service with the employer* factors into retirement benefits calculations. The majority, by dubiously labeling that plan as facially discriminatory under the ADEA, uses that statute to invalidate a policy that lies far from the "essence" of the ADEA—and, in fact, does not implicate that essence at all. Age in relation to years of service performed for this employer is not the same as age qua age. *See Hazen Paper,* 507 U.S. at 612 (the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore.").

There is a further problem with the majority's analysis. As the *Lyon* court noted, in reasoning that applies at least as much to this case:

> [The employer's] very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated plaintiff's "problem." Those most "disadvantaged" are those who were oldest at the time of hiring. It would be contrary to the letter, as well as the spirit, of the ADEA to penalize the employer for the incidental ramifications of objectivity.

53 F.3d at 140 n.6. Here, the older workers "discriminated against" are sometimes exactly those who were hired later in life, and thus had not accumulated as many years with this employer as a younger worker (although, as example 3 shows *(supra,* at 17), sometimes exactly this factor will give the later-hired older worker an advantage). Thus, I believe that

neither the intent nor the letter of the ADEA bars the reasonable KRS retirement plan, and I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 99-500-JBC

[Filed September 3, 2003]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF,	)
VS.	)
JEFFERSON COUNTY SHERIFF'S OFFICE, ET AL., DEFENDANTS.	)

ORDER

This action is before the court on the parties' cross-motions for summary judgment (Docket Nos. 72 and 100). For the following reasons, the defendant's motion will be granted and the plaintiff's motion will be denied.

Factual Background

Charles Lickteig applied for disability retirement benefits with the County Employees' Retirement System in 1995. His

request was denied because he was already eligible for normal retirement. Lickteig continued working until 1996, and then took normal retirement. He sought the aid of the EEOC, which now alleges that the disability retirement policy violates the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., because it discriminates against a class of individuals age forty and over on the basis of age.

Summary Judgment Motions

The plaintiff claims that it is entitled to summary judgment as to liability because the defendants violated the ADEA by paying reduced disability retirement benefits, or denying them altogether, to employees age forty or over. Further, the plaintiff states that the affirmative defenses raised by the defendants are unavailable or not established.

The defendant, Kentucky Retirement Systems, asserts that it is entitled to summary judgment because the plaintiff has failed to make out a *prima facie* case of discrimination or, in the alternative, because their affirmative defenses absolve them of liability. The defendant is also claiming that it is entitled to summary judgment because the EEOC failed to conciliate in good faith. Because the motion will be disposed of on the first ground, it is the only one that will be discussed.

Disability Retirement System

The disability retirement system in dispute is part of an overall retirement plan administered by Kentucky Retirement Systems. There is a single fund from which both normal retirement benefits and disability retirement benefits are paid. KRS § 78.5203. No employee may receive both types of benefits, as that would constitute "double dipping."

Once an employee becomes eligible for normal retirement benefits, that person is no longer eligible for disability retirement, and he will take normal retirement benefits when he retires. *See* KRS § 16.582. Eligibility for normal retirement occurs in one of two ways: either when an employee has reached the age of fifty-five and has five years of service, or when an employee has twenty years of service at any age.[1] KRS §§ 16.576, 16.577, 61.595. After an employee has attained either status, he is eligible for normal retirement and, as a consequence, is no longer eligible for disability retirement.

If an employee does receive disability retirement benefits, he may be eligible for service credits, that is, years of service not actually worked but imputed to the employee. Service credits and actual years of service together cannot exceed twenty years. KRS § 16.582. Service credits awarded cannot exceed the number of actual years of service. *Id.* Service credits are calculated beginning with the last date of paid service and continuing through a disabled employee's fifty-fifth birthday. *Id.*

Legal Analysis

The purpose of the ADEA is to prevent people from being deprived of benefits on the basis of inaccurate and stigmatizing stereotypes. *Wexler v. White's Fine Furniture,* 317 F.3d 564, 572 (6th Cir. 2003). If prohibited stereotypes

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[1] These are the requirements for eligibility for a hazardous worker. There are different requirements for non-hazardous workers. Because the claimant was a hazardous employee, and the same analysis applies for both types of employees, for the sake of clarity and simplicity the elements of hazardous employee retirement eligibility will be referred to in this order.

have not played a role in the institution of the disability retirement benefits plan, then the plan is not the result of inaccurate and denigrating generalizations about age, but instead represents an accurate judgment about employees. *See Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993). In order to analyze whether a disability retirement policy is discriminatory, the court uses the *McDonnell Douglas* three-part test. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). First, the plaintiff must establish a *prima facie* case; second, the defendant must offer legitimate, nondiscriminatory reasons for its actions; and third, the plaintiff must then prove that the reasons cited by the defendant are mere pretexts designed to mask age discrimination. *Wexler,* 317 F.3d at 574.

In this disparate treatment claim, the plaintiff must show that the defendants treat some employees less favorably because of their age and that the defendants have discriminatory intent. *See Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995). Liability depends on whether age actually motivates the decision of the party accused of discrimination. *See Hazen Paper Co.,* 507 U.S. 604. Intent may be shown if the disability retirement program is facially discriminatory. *See International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.,* 499 U.S. 187 (1991); *Solon v. Gary Community School Corp.,* 180 F.3d 844 (7th Cir. 1999). The test for facial discrimination in a statute is whether the evidence shows treatment of a person in a manner which but for that person's age would be different. *Johnson Controls, Inc.,* 499 U.S. at 201. Facial discrimination depends on the terms of the discrimination rather than the motive. In a retirement policy, age is necessarily a factor, as the very nature of such a program requires age considerations. In this

disability retirement policy, retirement eligibility is a product of age and years of service. However, finding a retirement policy facially discriminatory merely because age is a factor in the plan is illogical, and the court will not do so now. While discriminatory intent may not be required to show that a statute is facially discriminatory, some indication beyond the fact that a retirement policy uses age and years of service in its retirement eligibility scheme is needed in this case. Without any such indication, the plaintiff is asking the court to hold that age cannot be explicitly referred to in a retirement policy without violating the ADEA, and the court cannot so hold without undermining virtually every retirement policy in existence. Further, finding a retirement policy discriminatory because it calculates retirement eligibility based on age and years of service does nothing to further the purpose of the ADEA, which is to prevent employers from making employment decisions (including provision of benefits) based on denigrating stereotypes about age.

The plaintiff also alleges that the mechanism used to calculate service credits in the disability retirement policy is facially discriminatory because the closer an employee is to reaching normal retirement age (fifty-five) before becoming disabled and seeking disability retirement benefits, the fewer service credits the employee is eligible to receive.[2] In *Lyon*, "Option B," a portion of an early retirement policy which allowed for years of service to be imputed to an employee retiring early, was attacked as being discriminatory. The court emphasized again and again the importance of proving discriminatory intent in a disparate treatment claim. In that

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[2] As noted above, service credits also decrease as the employee nears twenty years of actual service, because the employee would be eligible for normal retirement at that time.

case, the court found that the plaintiff had not made out a *prima facie* case of discrimination because he had shown no evidence of discriminatory intent. The service credits portion of the disability retirement policy in question in this case is similar, and there is no evidence of discriminatory intent presented here. The plaintiff has failed to show how this retirement plan's age elements are discriminatory, either facially or through disparate treatment combined with intent.

Alternatively, the plaintiff states that the defendant violated the ADEA by forcing Lickteig into retirement. *See* 29 U.S.C. § 623(f)(2). In order to analyze a claim of forced retirement, the court must ask whether a reasonable person in the employee's position would feel compelled to resign under the circumstances. *Kalvinskas v. California Institute of Technology*, 96 F.3d 1305, 1308 n. 5 (9th Cir. 1996) *(quoting Bondar v. Synpol,* 843 F.2d 190, 192-3 (5th Cir. 1988)). However, an employee who leaves his employment willingly is precluded from arguing that he was constructively discharged or forced into retirement. *See Lapointe v. United Autoworkers,* 103 F.3d 485 (6th Cir. 1996). A reasonable person in Lickteg's position would not have felt compelled to retire. The plaintiff was entitled to unreduced retirement benefits, regardless of whether he continued to work. He was no longer entitled to receive disability retirement because he was eligible for normal retirement, and this was the case regardless of whether he resigned. Further, the plaintiff willingly left his employment, and he cannot now claim that he was forced to retire.

The plaintiff argues that he does not have to prove a *prima facie* case of discrimination because he has presented direct evidence of discrimination, in that the statutes describing the disability retirement plan are facially discriminatory. As the court holds that the retirement plan is not facially

discriminatory, there is no evidence of discrimination. However, as discussed below, even if the court were to accept that the plaintiff has established a *prima facie* case, or that he was excused from that requirement, he has not proven that the defendant's legitimate reasons for the disputed portions of the retirement plan are mere pretexts designed to mask age discrimination, and so he cannot succeed on his claims.

Assuming that the plaintiff has presented a *prima facie* case, the defendant must offer legitimate, nondiscriminatory reasons for the challenged disability retirement policies. There is one retirement fund which is used for both normal retirement and disability retirement. No employee may "double dip" and receive both types. The option to take disability retirement benefits is just one of the two alternative means of receiving retirement benefits from the common fund open to employees. Disability retirement is for those employees who become disabled and are forced to retire prematurely. An employee cannot pick and choose which type of benefits to receive because one type is only for those employees who become disabled before they are entitled to receive normal retirement, and not because the disability retirement benefits plan discriminates against older workers.

Service credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled. The credits are an attempt to provide an employee who becomes disabled before normal retirement with benefits similar to those which, had the employee been capable of continuing work through normal retirement, he would have been entitled to receive. The service credit calculation takes age into consideration because the credits are intended only to provide the disabled employee with those benefits that would have been available through normal retirement had the employee not become

disabled, not to provide the disabled employee with more benefits than normal retirement would have allowed. Thus, age comes into play in the determination only because age is one of the factors of retirement eligibility.

As the defendant has come forward with valid, nondiscriminatory reasons for the disputed elements of the disability retirement benefits plan, the plaintiff must prove that the reasons stated by the defendant are mere pretext designed to mask discrimination. The plaintiff's only allegations against the defendant were based on the assumption that the disability retirement statutes were facially discriminatory. Because the court finds that they are not facially discriminatory, the plaintiff's only remaining argument is that the defendant uses the combination of service years and age to comprise the components of eligibility for retirement as a proxy for age. Again, age will always be a factor in retirement plans. The fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a mask used to hide discrimination. Accordingly,

IT IS ORDERED that the plaintiff's motion for summary judgment (DE 72) is **DENIED.**

IT IS FURTHER ORDERED that the defendant's motion for summary judgment (DE 100) is **GRANTED.** The plaintiff's claims are **DISMISSED WITH PREJUDICE.**

As the plaintiff's claims against the other defendants are identical and based upon the same statutory language, and the court has found that there was no violation of the ADEA,

IT IS FURTHER ORDERED that the plaintiff's claims against the Commonwealth of Kentucky and the Jefferson

County Sheriff's Office are also **DISMISSED WITH PREJUDICE.**

This the 3rd day of September, 2003.

/s/
JENNIFER B. COFFMAN, JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 99-500-JBC

[Filed September 3, 2003]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF,	)
VS.	)
JEFFERSON COUNTY SHERIFF'S OFFICE, ET AL., DEFENDANTS.	)

JUDGMENT

The court, having granted summary judgment in favor of the defendant, Kentucky Retirement Systems, and having dismissed the plaintiff's claims with prejudice, enters judgment in favor of the defendants.

This is a **FINAL** and **APPEALABLE** order, and no just cause for delay exists.

This matter is **STRICKEN** from the court's active docket.

This the 3rd day of September, 2003.

/s/
JENNIFER B. COFFMAN, JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

FILED
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SUPREME COURT, U.S.

No. 06-1037

In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether proof that an employee benefit plan on its face requires older workers to be denied disability benefits available to younger workers or to receive fewer disability benefits than younger workers establishes a prima facie case of discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-38a) is reported at 467 F.3d 571. The opinion of the panel of the court of appeals is reported at 424 F.3d 467. The order of the district court (Pet. App. 39a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2006. The petition for a writ of certiorari was filed on January 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission (EEOC) brought suit against petitioners Kentucky Re-

tirement Systems (KRS), the Jefferson County Sheriff's Department, and the Commonwealth of Kentucky, alleging that the KRS disability-retirement benefits plan discriminates on the basis of age in violation of the Age Discrimination Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, as amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978. The district court granted summary judgment to petitioners, holding that the KRS plan does not discriminate on the basis of age because it is not based on denigrating stereotypes. Pet. App. 39a-47a. The court of appeals reversed, holding that the KRS plan is facially discriminatory, and that proof that a plan is facially discriminatory creates a prima facie case of age discrimination, without regard to whether the plan is based on animus against older workers. *Id.* at 1a-38a.

1. The ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual [age 40 or older] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1), 631(a). "The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 630(*l*). As amended by the OWBPA, the ADEA permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i).

2. The KRS plan offers normal retirement benefits to employees covered by the plan. Pet. App. 5a. Employees who work in hazardous positions are eligible for

normal retirement benefits at age 55 or after completing 20 years of service, while employees in nonhazardous positions are eligible for normal retirement benefits at age 65 or after 27 years of service. *Ibid.*; see Ky. Rev. Stat. § 61.559(2)(d) (Michie 2004); *id.* § 78.545(7) (1995).

The KRS plan also offers disability benefits. Pet. App. 5a. Under the plan, however, when workers become disabled after reaching the normal retirement age, they are disqualified from seeking disability retirement benefits. *Id.* at 6a. Consequently, a person working in a hazardous position who becomes disabled after reaching age 55 may receive only normal retirement benefits. *Ibid.* That benefit is generally calculated as 2.5% of the employee's final compensation times the number of years worked. *Ibid.*

Employees in a hazardous position who become disabled when they are under 55 and have less than 20 years of service are eligible for disability benefits. Pet. App. 6a. The amount of the benefit is calculated by adding to the number of years the employee actually worked the number of years remaining until the worker would have reached either normal retirement age or 20 years of service, but no more than the number of years already worked. *Ibid.*

The KRS plan also guarantees a hazardous duty employee who is eligible for disability retirement and becomes disabled in the line of duty monthly benefits of at least 25% of monthly final rate of pay. Pet. App. 7a. If such an employee has dependent children, the employee is entitled to a dependent-child benefit of 10% of monthly final rate of pay for each child, up to a maximum for all dependent children of 40% of monthly final rate of pay. *Ibid.* Those benefits are not available to a

hazardous duty employee who becomes disabled after reaching normal retirement age. *Ibid.*

Under the KRS plan, the amount paid annually to a worker who retires on disability at a younger age will frequently exceed (and will never be less than) the annual benefits of a worker who retires due to disability at an older age, where every factor, other than age, that is relevant to determine an employee's benefits is identical. Pet. App. 8a. Moreover, in every case, a worker younger than normal retirement age who retires on disability will receive more benefits each year than an older employee who becomes disabled after reaching normal retirement age and retires from the same job, with the same disabling condition, length of service, and final compensation. *Ibid.*

3. Charles Lickteig was employed in a hazardous duty position by the Jefferson County Sheriff's Department, a participant in the retirement system operated by KRS. Pet. App. 4a. When Lickteig became unable to work due to disability, he applied to KRS for disability retirement benefits. *Ibid.* KRS notified Lickteig that under Kentucky law, he was ineligible for disability retirement because he was over 55 and in a hazardous position. *Id.* at 4a-5a.

Lickteig filed a charge with the EEOC, alleging that he had been denied benefits because of his age. Pet. App. 5a. The EEOC sought to resolve Lickteig's discrimination charge through informal means, but those efforts proved unsuccessful. *Id.* at 10a. The EEOC then filed suit against petitioners KRS, the Jefferson County Sheriff's Office, and the Commonwealth of Kentucky, alleging that petitioners maintain an employee benefit plan that denies or pays fewer disability retirement benefits to older individuals because of age, in violation of

the ADEA. *Id.* at 2a. The EEOC sought declaratory, injunctive, and monetary relief for Lickteig and a class of similarly situated individuals who, because of age, were excluded from disability retirement, or applied for disability retirement and have received fewer annual benefits, since the effective date of the OWBPA. *Id.* at 9a-10a.

Petitioners moved to dismiss the suit on Tenth and Eleventh Amendment immunity grounds, but the district court denied the motion, and the court of appeals affirmed. Pet. App. 10a. On remand, the parties filed cross-motions for summary judgment. *Ibid.* Petitioners asserted both that the EEOC had not established a prima facie case of discrimination and that any such discrimination fell within the ADEA's statutory exceptions. *Id.* at 40a; see 29 U.S.C. 623(f)(2)(B)(i) and (ii).

The district court granted summary judgment to petitioners. Pet. App. 39a-47a. Relying on the Sixth Circuit's decision in *Lyon* v. *Ohio Education Ass'n*, 53 F.3d 135 (1995), the court concluded that while age is a factor in the KRS plan, the plan does not discriminate on the basis of age because it is not based on "denigrating stereotypes about age." Pet. App. 42a-43a.

4. A panel of the court of appeals affirmed. Pet. App. 10a. The panel expressed "concerns regarding the soundness of *Lyon's* reasoning," but "deemed itself bound by the *Lyon* decision. *Ibid.* The panel stated that "[b]ecause the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan * * * in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA." *Id.* at 11a.

5. The court of appeals granted rehearing en banc, reversed the district court's grant of summary judgment for petitioners, and remanded for further proceedings.

Pet. App. 1a-38a. The court held that the EEOC had "established a prima facie violation of the ADEA, because the KRS plan is facially discriminatory on the basis of age." *Id.* at 3a. The court further ruled "that when an employment policy or benefit plan such as the KRS plan is facially discriminatory, a plaintiff challenging the policy does not need additional proof of discriminatory animus in order to establish a prima facie disparate-treatment claim." *Ibid.* The court concluded "that *Lyon*'s standard for a disparate-treatment age-discrimination claim is inconsistent with Supreme Court authority as well as the rulings of several of our sister circuits in cases involving the similar role of age in employee-benefit plans." *Ibid.* The court "therefore overrule[d] in part [its] previous decision in *Lyon*." *Ibid.*

In reaching those conclusions, the court of appeals relied on this Court's decisions in *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), and *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). Pet. App. 15a-17a. The court of appeals explained that, under those decisions, a plan is facially discriminatory when it requires adverse treatment of older workers because of their age. *Id.* at 15a.

Applying that definition of facial discrimination, the court concluded that the KRS plan "is facially discriminatory on the basis of age in at least two ways." Pet. App. 16a. First, the KRS plan "categorically excludes" employees over age 55 from disability benefits that are available to younger employees who are "similarly situated in all relevant respects other than age." *Ibid.* Second, the KRS plan is facially discriminatory because "employees who become disabled when they are still

'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." *Id.* at 17a.

The court of appeals also relied on *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989). The court explained that "[t]he KRS plan's disqualification of employees age fifty-five and over for disability benefits closely resembles the characteristic of the plan in *Betts* that the Supreme Court found to be facially discriminatory," but subject to the exemption for benefit plans that existed before the ADEA was amended by the OWBPA. Pet. App. 18a. The "legislative history" of the OWBPA, the court added, "is compelling evidence that when revising the ADEA in response to *Betts*, Congress intended to prohibit the very sort of age-based discrimination that the original panel, bound by *Lyon*, condoned in this plan." *Id.* at 19a. The court also noted that many other circuit courts had "reached conclusions contrary to *Lyon*." *Ibid.* (citing cases in which "the Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations").

The court rejected petitioner's contention that the ADEA requires proof that a facially discriminatory plan is based on a discriminatory animus against older workers. Pet. App. 20a-21a. The court explained that, under *International Union, United Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), and *Hazen Paper*, "[o]nce a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee 'because of' the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself." Pet. App. 20a.

Chief Judge Boggs dissented. Pet. App. 25a-38a. He concluded that the plan was lawful on the ground that "it considers age only in combination with years of service and years to retirement age," and that, in his view, did not facially discriminate on the basis of age. *Id.* at 26a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, because the case is in an interlocutory posture, petitioners' claims about the potential impact of the decision are speculative and premature. Further review is therefore not warranted.

1. On its face, petitioners' benefits plan treats older workers less favorably than younger workers because of their age. As the court of appeals explained, petitioners' plan is facially discriminatory in two ways. First, the plan categorically excludes workers who have reached the normal retirement age from eligibility for disability-retirement benefits, while affording such benefits to persons who become disabled before they reach normal retirement age. Pet. App. 2a. Second, the plan affords older workers who are eligible for disability-retirement benefits lower monthly benefits than younger workers who are similarly situated in every relevant respect except their age. *Ibid.*

Petitioners do not dispute that, in those two respects, their plan facially treats older workers less favorably than younger workers because of their age. Instead, they argue (Pet. 9-13) that the ADEA does not prohibit such age-based adverse treatment, absent proof that the difference in treatment is arbitrary. Petitioners further argue that age-based adverse treatment is arbitrary only when it is based on "inaccurate and stigmatizing

stereotypes." Pet. 18 (citation omitted). Petitioners' contentions are without merit.

As the text of the statute, this Court's decisions, and Congress's response to the *Betts* decision demonstrate, a benefits plan that facially treats older workers less favorably than younger workers because of their age violates the ADEA unless it falls within one of the ADEA's exceptions from the general prohibition against discrimination. There is no additional requirement that a plaintiff demonstrate that a facially discriminatory plan is animated by inaccurate or stigmatizing stereotypes.

a. Subject to certain specified exceptions, the ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual [age 40 or older] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1), 631(a). The plain language of that prohibition makes it unlawful for an employer to "treat some people less favorably than others because of their [age]." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 609 (1993) (citation omitted). That basic test of discrimination is clearly satisfied when, as here, an employer relies "upon a formal, facially discriminatory policy requiring adverse treatment of [older] employees." *Id.* at 610. In such cases, the terms of the policy furnish direct evidence that "the employee's protected trait actually played a role in [the employer's decisionmaking process] and had a determinative influence on the outcome." *Ibid.* There is no need to demonstrate, in addition, that the employer relied on negative stereotypes in establishing the facially discriminatory policy.

The Court's decision in *International Union, United Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S.

187 (1991), is instructive. In that case, an employer excluded fertile women, but not fertile men, from certain lead-exposed jobs because of their sex. *Id.* at 190-192. The employer argued that the policy did not discriminate on the basis of sex because it was not based on a malevolent motive. The Court rejected that contention, explaining that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Id.* at 199. The Court added that "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Ibid.*

Johnson Controls involved an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, rather than the ADEA. But its "interpretation of Title VII * * * applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (citation and internal quotation marks omitted). Thus, a benefits plan that on its face requires adverse treatment because of age contravenes the ADEA's general prohibition, without regard to the employer's subjective motivations for adopting that plan.

That does not mean that a plan that facially requires adverse treatment of older workers because of their age automatically violates the ADEA. The ADEA contains several exceptions that qualify that general prohibition. For example, the ADEA permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on be-

half of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i). The ADEA also permits an employer to adopt a "voluntary early retirement incentive plan" that is consistent with the relevant purposes of the ADEA, 29 U.S.C. 623(f)(2)(B)(ii), and to deduct from long-term disability benefits the amount of pension benefits "for which an individual who has attained the later of age 62 or normal retirement age is eligible." 29 U.S.C. 623(*l*)(3). But absent proof of such a statutory exception, a plan that facially requires adverse treatment of older workers because of their age violates the ADEA.

b. This Court's Title VII decisions involving benefits plans confirm that benefits plans that facially require adverse treatment because of age fall within the ADEA's general discrimination prohibition, without regard to whether the discrimination is based on inaccurate and stigmatizing stereotypes. In *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the Court held that a retirement plan that paid equal monthly retirement benefits to similarly situated men and women, but required female employees to make larger monthly contributions to the pension fund violated Title VII. *Id.* at 705. The Court acknowledged that, in setting a higher contribution rate for female employees, the employer had not relied on "'stereotyped' impressions about the characteristics of males or females," or "a fictional difference between men and women." *Id.* at 707. Instead, the employer had based its decision on "a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men." *Ibid.* The Court held, however, that the employer's motives could not redeem a practice that "on its

face discriminated against individual employees because of their sex." *Id.* at 716.

Similarly, in *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), the Court held that a retirement plan that paid women lower monthly benefits than men who deferred the same amount of compensation violated Title VII. The Court explained that in *Manhart* it had held that a plan requiring women to make greater contributions than men discriminates because of sex "for the simple reason that it treats each woman in a manner which but for her sex would have been different." *Id.* at 1081 (citation, internal quotation marks, and brackets omitted). The Court then concluded "the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." *Ibid.*

The reasoning in *Manhart* and *Norris* is equally applicable here. Because petitioners' plan facially treats older workers less favorably than younger workers, it falls within the ADEA's general prohibition, without regard to whether that difference in treatment is grounded in inaccurate or denigrating stereotypes.

c. The Court's decision in *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989), and Congress's response to the decision, reinforce that conclusion. Like the plan at issue in this case, the plan at issue in *Betts*, "[o]n its face," rendered employees "ineligible for disability retirement" once they reached a particular age. *Id.* at 166. The lower courts concluded that the plan fell within the ADEA's general prohibition against discrimination because of age, and did not fall within the then-existing exemption for bona fide benefit plans that were not a subterfuge to evade the purposes of the ADEA. *Id.* at 163-165. The Court did not take issue

with the lower courts' assessment that the plan fell within the ADEA's general prohibition. It held, however, that the plan fell within the exemption for bona fide benefit plans. The Court reasoned that the exemption encompassed any "bona fide benefit plan from the purview of the ADEA so long as the plan [was] not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Id.* at 177. An EEOC regulation had interpreted the exemption to apply only to "benefit plans in which all age-based reductions in benefits are justified by age-related cost considerations," but the Court invalidated the regulation as "contrary to the plain language of the statute." *Id.* at 175.

In response to *Betts*, Congress enacted the OWBPA. The OWBPA eliminated the "subterfuge" language that had led the Court in *Betts* to invalidate the EEOC's regulation. In its place, the OWBPA codified the EEOC regulation's equal cost defense. 29 U.S.C. 623(f)(2)(B)(i). The purpose of the OWBPA is clear: "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." OWBPA § 101, 104 Stat. 978 (29 U.S.C. 621 note). Thus, as a result of the OWBPA, plans like the one at issue in *Betts* and at issue here that facially provide less benefits to older workers because of their age violate the ADEA, unless the employer can demonstrate that the age-based disparity in benefits is cost-justified, 29 U.S.C. 623(f)(2)(B)(i), or falls within the scope of another explicit statutory exemption, such as the exemption for early retirement incentive plans. 29 U.S.C. 623(f)(2)(B)(ii).

d. In arguing otherwise, petitioners rely (Pet. 11) on Section 621(b), which states that a purpose of the ADEA is "to prohibit arbitrary age discrimination in employment." Petitioners seek to derive from that abstract statement of purpose a rule that an age-based practice is not prohibited unless it reflects inaccurate and denigrating stereotypes. Pet. 18. In order to determine the type of age discrimination that Congress sought to eliminate as "arbitrary," however, a court "must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate." *Betts*, 492 U.S. at 176. The ADEA's substantive prohibitions do not seek to eradicate "arbitrary age discrimination," 29 U.S.C. 621(b), by requiring a court to decide in each case whether a particular act of age discrimination reflects denigrating stereotypes. Instead, the substantive prohibitions seek to eradicate "arbitrary age discrimination" by making it unlawful for an employer to "discriminate" against an older worker "because of such individual's age," 29 U.S.C. 623(a)(1), unless the discrimination falls within one the ADEA's specified statutory exceptions, such as the exception for benefit plans that are justified by differences in cost. 29 U.S.C. 623(f)(2)(B)(i). Thus, an employment practice that facially treats older workers less favorably than younger workers because of their age, and does not fall within one of the statutory exceptions is, by definition, the kind of "arbitrary age discrimination" that the ADEA prohibits.

Petitioners' reliance (Pet. 18) on *Hazen Paper* is also misplaced. In that case, the Court held that a plaintiff could not establish dissimilar treatment by showing that an employment decision was based on a factor that merely correlates with age, such as an employee's

length of service. 507 U.S. at 608-609. The Court reasoned that in enacting the ADEA, Congress "was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," *id.* at 610, and that when an employer "is wholly motivated by factors other than age," that concern disappears "even if the motivating factor is correlated with age." *Id.* at 611 (emphasis omitted). The Court did not suggest, however, that when an employment practice is directly based on age, a plaintiff would have to establish that the practice is also motivated by inaccurate and stigmatizing stereotypes. To the contrary, the Court reaffirmed the settled Title VII and ADEA principle that disparate treatment is established when a plaintiff can show that an employer has "relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with [a protected] trait." *Id.* at 610. That settled principle is controlling here.

2. There is no conflict in the circuits on the question presented in this case. Every other court of appeals that has considered the question has reached the same conclusion as the court below. See *Jankovitz* v. *Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653 (8th Cir. 2005) (holding that a benefit plan that rendered an employee over the age of 65 ineligible for early retirement benefits was "discriminatory on its face"); *Abrahamson* v. *Board of Educ. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 72-73 (2d Cir. 2004) (holding that an early retirement incentive plan that limited eligibility based on a combination of age and years of service established a "prima facie case of age discrimination under the ADEA"); *Arnett* v. *California Pub. Employees Ret. Sys.*, 179 F.3d 690, 695-696 (9th Cir.

1999) (holding that a formula for calculating disability retirement benefits by awarding the lesser of 50% of final pay or the amount the employee would have received in service retirement benefits had he continued to work to normal retirement age "stated a disparate treatment claim" under ADEA), vacated on other grounds, 528 U.S. 1111 (2000); *Auerbach* v. *Board of Educ. of the Harborfields Cent. Sch. Dist.*, 136 F.3d 104, 109-114 (2d Cir. 1998) (holding that a retirement incentive plan that provided additional benefits for teachers who retired at the age they first became eligible "established a *prima facie* case of age discrimination"); *Huff* v. *UARCO*, 122 F.3d 374, 387-388 (7th Cir. 1997) (holding that an early retirement plan that denied an option to receive a lump-sum payout of pension contributions to employees once they became eligible for early retirement at age 55 with 10 years of service drew "an express line between workers over [55] and those under" and therefore stated an ADEA claim "of disparate treatment"); *Solon* v. *Gary Cmty. Sch. Corp.*, 180 F.3d 844, 855 (7th Cir. 1999) (holding that early retirement incentive plans that excluded employees over 62 were "discriminatory on their face" and that "independent proof of an illicit motive [was] unnecessary"). Indeed, as the en banc court explained, the Sixth Circuit's decision to overrule its prior decision in *Lyon* fostered accord, not conflict, among the circuits. See Pet. App. 19a-20a.

3. Nor is there any other basis for granting review in this case. Petitioners assert (Pet. 19) that the decision below will have a substantial impact on state retirement programs. But the decision below simply held that the EEOC established a prima facie case of discrimination by showing that petitioners' plan facially discriminates because of age. The court of appeals did not rule

on petitioners' claim that the plan's reduced benefits to older workers is justified under the statutory exemption in 29 U.S.C. 623(f)(2)(B)(i). Petitioners are free to press that claim on remand. Because liability has yet to be determined, any consideration of a potential impact of the decision below is speculative and premature. The interlocutory posture of the case therefore counsels against granting certiorari. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of a writ of certiorari).

Furthermore, in the event petitioners are found liable on remand, the appropriate remedy would be subject to equitable considerations. See *Manhart*, 435 U.S. at 718-723. For that reason as well, the impact of the court of appeals' decision on petitioners' plan cannot be assessed until proceedings on remand have been completed, and the interlocutory posture of the case therefore counsels against further review.

Petitioners' claim about the potential impact of the decision also ignores the efforts that Congress made in the OWBPA to minimize the impact of that legislation on state plans. Because the decision in *Betts* concerned a state-sponsored benefit plan for public employees, Congress was aware that the ADEA, as amended by OWBPA, would require adjustments to such plans. Congress sought to accommodate the States' needs through several provisions. First, Congress enacted "a special rule authorizing" state and municipal employers to offer existing employees the opportunity to "make a one-time election to retain coverage under the old plan for disability benefits or to be covered under new disability benefits that conform to the amendments made by this bill." *Explanation of S. 1511*, 136 Cong. Rec. 27,060 (1990); see OWBPA § 105(c)(2), 104 Stat. 981 (29 U.S.C.

623 note). Second, Congress gave state and local governments "two years from the date of enactment to bring their plans into compliance," while private employers with existing plans that were not subject to collective bargaining had "180 days to be brought into compliance." 136 Cong. Rec. at 27,060; see OWBPA § 105(a) and (c)(1), 104 Stat. 981 (29 U.S.C. 623 note). And third, in response to "[s]ome States" that had "indicated a lack of familiarity with actuarial practices that are well-established in the private sector," 136 Cong. Rec. at 24,607 (statement of Sen. Pryor), Congress directed the EEOC and other federal agencies, upon request, to "provide assistance to state and local governments in identifying and securing independent technical advice to assist in complying" with the new legislation. *Id.* at 27,060; see OWBPA § 105(c)(3), 104 Stat. 982 (29 U.S.C. 623 note).

Congress's actions demonstrate both that petitioners' claim about the potential impact of this case are overstated and that Congress was sensitive to the financial and related burdens faced by public employers in state-sponsored public benefit plans. There is no reason for the Court to grant certiorari in this case and reconsider the balance struck by Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the
Supreme Court of the United States

Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff's Department,
Petitioners,

v.

Equal Employment Opportunity Commission,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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ARGUMENT

WHETHER ANY USE OF AGE AS A FACTOR IN A RETIREMENT PLAN IS "ARBITRARY" AND THUS RENDERS THE PLAN FACIALLY DISCRIMINATORY IN VIOLATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT?

I. The Sixth Circuit decision conflicts with the decisions of this Court.

The EEOC's argument incorrectly equates the blanket discrimination on the basis of race and gender addressed in Title VII to the prohibition against "arbitrary" age discrimination in the ADEA. This Court in *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158 (1989), *General Dynamics Land Systems v. Cline,* 540 U.S. 581 (2004) and *Smith v. City of Jackson,* 544 U.S. 228 (2005) has repeatedly recognized this distinction in its analysis of ADEA cases. The 6th Circuit Court's failure to do so places its decision in direct conflict with the decisions of this Court.

Utilizing this Title VII analysis, the EEOC places substantial reliance upon the decision of this Court in *International Union, United Automobile Workers v. Johnson Controls, Inc.,* 499 U.S. 137 (1991). Even assuming for the purposes of argument that the EEOC's analysis of the standard of discrimination is comparable, the facts in *Johnson Controls* and its impact on the decision by this Court support the position of the Petitioner. In *Johnson*, fertile women were excluded from certain lead exposed jobs because of their gender. The rationale given was the effect on childbearing despite the fact that male workers who contribute to the genetic equation were equally at risk. Utilizing the ADEA's

"arbitrary" standard for measuring age discrimination, the policy at issue was arbitrary. In other words, under the policy in *Johnson Controls,* no woman of childbearing age would ever have a job making batteries, despite the fact that men faced the identical fertility related risks.

In the statutory structure at issue in the present case, it is not automatic that the older workers fare less favorably than the younger. In his dissent, Judge Boggs notes three examples in which employees of differing ages would receive either the identical benefit or the older worker would fare better than the younger. Pet. App. 34(a)-35(a). These examples demonstrate starkly that age is not a controlling variable in the operation of the KRS plan. *Id.* at 35(a). Unlike the role of gender at issue in *Johnson Controls*, age is not automatically a barrier to the greater benefit in KRS.

The same analysis applies to the EEOC's reliance on *City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702 (1978). In *Manhart*, all females were required to make larger contributions to the retirement plan than all males despite the fact that all females would not necessarily live longer than all males. *Id.* at 704. Gender was the sole basis for the challenged policy.

In the present case, however, it is the Kentucky Legislature's goal of ensuring an injured employee an opportunity to receive an unreduced retirement benefit which is at issue, not an arbitrary barrier based on age. Once an employee becomes eligible to receive an unreduced normal retirement, eligibility for disability benefits ends. A 38 year old employee with 20 years of service who becomes disabled is ineligible for a disability retirement because he or she has accumulated the requisite service to be eligible for an unreduced normal retirement. A 50 year old employee with

10 years of service would be entitled to 5 years worth of imputed service under the disability retirement provisions of the plan to meet the necessary requirements for an unreduced, normal retirement. The example of Charles Lickteig (Opp. 4) establishes the point. Lickteig was ineligible for disability because he was eligible for an unreduced normal retirement, not due to an arbitrary policy of discrimination on the basis of age.

The structure of the KRS plan, with its short vesting schedule, enables workers hired later in life to retire more quickly than those hired upon first becoming eligible to enter the adult work force. If the plan simply required 20 years of service to be eligible for an unreduced, normal retirement, employees over age 40, particularly those hired later in life, would be far less likely to receive a retirement benefit. The size of the benefit is a function of years of service, rather than merely age for its own sake. Disability retirement is simply intended, within certain limits, to place workers where they would have been had they been able to work until eligible for normal retirement. Age is relevant only in the context that it provides one of two measures in which one may qualify for a retirement benefit. Legitimate reasons for relying on age as a factor in the decision-making process must be distinguished from invidious reasons. *See, General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581 (2004).

In *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), this Court held the test of discrimination is clearly satisfied when an employer relies upon a "formal, facially discriminatory policy requiring adverse treatment of [older] employees." *Id.* at 610. There is nothing in KRS' policy that *requires* the adverse treatment of an older worker "because of such individual's age" as required in 29 U.S.C. § 623(a)(1). As the plan has no such requirement, there must then be proof

that age actually played a role in the employment decision. *Id.* at 609-610.

The "motivating factor" for the retirement policy at issue was the focus of this Court's inquiry in *Hazen Paper. Id.* at 609-610. It has not been suggested, nor does any case hold, that a governmental retirement plan may not require a worker to complete a specific number of years or attain a combination of age plus years of service to be eligible to retire. The KRS plan is simply designed to advance an injured worker to the first available date of eligibility to receive an unreduced, normal retirement to achieve the Kentucky Legislature's goal of ensuring that all injured workers are or will become eligible for an unreduced, normal retirement. The argument then returns to the question which the EEOC failed to address; that is, whether *any* use of age is prohibited by the ADEA and the OWBPA. Clearly it is not.

The EEOC's argument that all circuits are in accord on this issue is incorrect. Each of the circuit court decisions relied upon by the Sixth Circuit and recited by the EEOC in its response involved issues in which there was no circumstance in which a younger worker fared less favorably under the program at issue than an older worker. The dissent in the Sixth Circuit recognizes it is not true in the case of KRS and the EEOC fails to overcome this critical distinction.

In a disparate treatment case, it is the ultimate burden of the plaintiff to establish that the defendant intentionally discriminated on the basis of age. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Where there is no proof that age motivated the policy at issue, a prima facie case of liability does not exist. *Hazen, supra* at 610; *see also, Smith v. City of Jackson,* 544 U.S. 228 (2005). The EEOC presented no such proof in this case.

When it intentionally excluded governmental plans from coverage under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*, Congress decided to leave the design of state and local retirement plans to the states. 29 U.S.C. § 1003(b)(1). Virtually every one of the more than 2700 public employee retirement systems in the United States provides eligibility for unreduced, normal retirement employing some use of age. The essence of the Sixth Circuit decision is that any use of age automatically establishes an arbitrary and discriminatory policy. Nothing in the ADEA calls for such a conclusion and the Sixth Circuit's reasoning is directly contrary to that of this Court.

Accordingly, certiorari should be granted.

II. The case is ripe for determination.

The EEOC argues that the existence of a remand for trial should preclude the granting of certiorari. Opp. 17. The EEOC is mistaken. This Court has regularly granted review of cases in the current procedural posture. It is significant to note that the EEOC itself sought certiorari on a less developed record in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). In *Waffle House*, this Court granted the EEOC's petition for review on an interlocutory ruling that implicated a circuit conflict on a discrimination question. The present case is review of a final summary judgment based on the failure of the EEOC to establish a prima facie case of discrimination.

The procedural posture of a decision is not an impediment to certiorari where the Court of Appeals has "decided an important issue, otherwise worthy of review" where final resolution of that issue "may serve to hasten or resolve the litigation." *See generally*, Stern, *Supreme Court Practice* (8th Edition 2002) § 4.18, at 260.

The determination of the facial discrimination issue is "fundamental to the further conduct of the case." In such circumstances, this Court has not hesitated to grant certiorari. *United States v. General Motors*, 323 U.S. 373 (1945).

This is a disparate treatment case. Absent a finding of facial discrimination, given the admitted absence of any evidence of discriminatory animus, the litigation ends. Addressing the issue now spares both state government and the EEOC unnecessary litigation. The limited, legal issue before the Court warrants the grant of certiorari.

CONCLUSION

For these reasons, the Kentucky Retirement Systems, the Commonwealth of Kentucky, and Jefferson County Sheriff's Department ask that this Petition for Certiorari be granted so that this Court can define what constitutes facial discrimination under the ADEA in the context of a retirement plan.

Respectfully submitted on this the 15th day of June, 2007.

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ARGUMENT[1]

I. THE EEOC FAILED TO ESTABLISH A PRIMA FACIE CASE BECAUSE KENTUCKY'S RETIREMENT STATUTE DOES NOT DIFFERENTIATE AMONG EMPLOYEES "BECAUSE OF [THEIR] AGE."

A. The EEOC Advocates a Legal Standard that Is Inconsistent with the ADEA's Plain Language.

The EEOC concedes that it cannot establish a prima facie case of age discrimination unless it demonstrates that Kentucky intentionally differentiates among employees "'because of [their] age.'" Resp. 16 (quoting 29 U.S.C. § 623(a)(1)). The EEOC does not dispute that this statutory language means "there is no disparate treatment under the ADEA when *the factor motivating* the employer is some feature other than the employee's age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (emphasis added).

The EEOC does not, however, even try to prove that age—as opposed to retirement eligibility—was the "factor motivating" Kentucky. It argues that the intent to discriminate "because of ... age" is

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[1] Petitioners' opening brief will be cited as "Pet'r" and the EEOC's response brief will be cited as "Resp." The amicus briefs will be cited as "____ Br.", according to the initials of the first-named amicus, except that the amicus brief submitted by 13 states will be cited as "States Br." This reply brief follows the same abbreviations and conventions as the opening brief.

evident on the face of Kentucky's statute, for one reason: that age *can be* a factor in determining eligibility for retirement (or in calculating the time remaining before retirement), which, in turn, determines eligibility for (or can influence the amount of) disability retirement benefits.

The only way the EEOC can make this argument, however, is to rewrite the ADEA's operative language. According to the EEOC, the phrase "because of ... age" means that "the ADEA generally requires" an employer to "'*ignore an employee's age*,' ... when a disabled worker applies for retirement benefits." Resp. 16 (quoting dicta from *Hazen Paper*, 507 U.S. at 612) (emphasis added). Thus, at critical junctures, the EEOC argues that Kentucky's retirement statute violates the ADEA merely because it entails "*consideration of* the applicant's age," Resp. 20 (emphasis added), or because it employs "explicit age-based criteria," Resp. 18.

Almost as soon as the EEOC redlines the statutory language, it retreats from its revised formulation. That is because, as the EEOC acknowledges, the ADEA does *not* "generally require[]" any such thing. Resp. 17; *see* Resp. 25. So the EEOC reformulates its reformulation into a one-way ratchet: "[T]he ADEA does not prohibit *all* uses of age as a criterion for awarding retirement benefits," the EEOC acknowledges. Resp. 26 (emphasis in original). Rather, it prohibits an employer only from "us[ing] the same age-55 threshold as a basis for paying older disabled employees *lower* benefits than similarly situated younger disabled workers would receive." Resp. 27 (emphasis in original).

None of this appears in the ADEA's actual language, which focuses on whether an employer has acted "because of ... age." The ADEA requires an analysis of whether the "motivating factor"—the *actual reason*—for denying benefits was retirement eligibility (as Kentucky insists) or age, *Hazen Paper*, 507 U.S. at 609, not whether the employer "ignores" age.

In support of its counter-textual reading, the EEOC invokes Title VII decisions holding "that *sex*-based distinctions in employment are facially discriminatory." Resp. 22 (emphasis added) (citing *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991)). The EEOC posits that the same must always be true of "*age*-based distinctions," because "interpretation of Title VII" often "'applies with equal force in the context of age discrimination.'" *Id.* (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)).

As this Court has since held, Title VII principles cannot be uncritically transplanted into the ADEA when they do not make sense. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586-87 (2004); Pet'r 46-48. This is one such circumstance. It would obviously be impermissible to tell an employee, "Sorry, you are not white enough (or male enough or American enough) to retire." It is, therefore, self-evident that an employer cannot invoke such an obviously impermissible eligibility rule to deny disability retirement benefits—or calculate their amount. Age is different, precisely because it *is* permissible

to tell an employee, "Sorry, you are not *old* enough to retire."

Thus, while there are times when an explicit age-based criterion obviously evinces a discriminatory intent, *see, e.g.*, *Thurston*, 469 U.S. at 121-22, there are other times when it does not. It can be permissible to calculate disability retirement benefits with reference to eligibility for normal retirement, so long as the reference to eligibility is not a pretext for age discrimination.

As is implicit in this last point, ruling in Kentucky's favor in this case would not mean that eligibility for retirement can "routinely" be used to "circumvent[]" the ADEA's "general ban on age-based discrimination." Resp. 26. The EEOC is correct, for example, that Kentucky "could not mandate ... that workers who are eligible for normal retirement benefits ... will be paid lower wages than employees who do not qualify for normal retirement." *Id.* The ploy would be impermissible because, in the hypothetical posited, retirement eligibility is obviously a pretext for age discrimination. There is no reason to diminish salary in light of eligibility for retirement *except* to discriminate on the basis of age. The same is true with respect to virtually all "other employment-related decisions," *id.*, such as whether to promote employees, whether to furnish health benefits to employees, or whether to offer severance in the event of a mass layoff. Because each of these employment decisions bears no rational connection to retirement eligibility, an artificial linkage would be a self-evident pretext.

The opposite is true in this context, precisely because the rationale for offering disability

retirement benefits is inextricably linked to retirement eligibility, and there is no evidence, and no reason to believe, that the linkage is pretextual—a topic we turn to next.

B. Kentucky's Statute Differentiates on the Basis of Eligibility for Normal Retirement, and Does Not Invoke Eligibility as a Pretext for Age Discrimination.

Because the EEOC focuses on the wrong legal standard, it fails to dispute any of the key principles or facts Kentucky has adduced to demonstrate that it is not differentiating among employees "because of [their] age," but is genuinely distinguishing among them on the basis of eligibility for normal retirement. The EEOC does not dispute that Kentucky's intent is to provide disability retirement benefits as a safety net only to those employees who are not already eligible for normal retirement benefits, *see* Pet'r 6-8, or that it is perfectly rational to define eligibility for the safety net with reference to when the safety net is needed, *see* Pet'r 22. There is no dispute that this is how the federal government has structured the Social Security disability program and how private insurers structure term disability insurance. Pet'r 49-50.

In fact, just two days ago, the EEOC promulgated a final regulation applying this very structure and rationale to retiree health benefits. *See* 72 Fed. Reg. 72,938 (Dec. 26, 2007). The EEOC has declared that an employer may "alter[], reduce[] or eliminate[]" retiree health benefits "when the participant is eligible for Medicare

health benefits." *Id.* at 72,945 (adding new 29 C.F.R. § 1625.32(b)).

The EEOC has not pointed to anything in the record suggesting that Kentucky's asserted motivation is an artifice masking an actual intention to disfavor older workers. There is nothing that belies the District Court's observation that, "[t]he fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a mask used to hide discrimination." J.A. 32.

Indeed, the EEOC has never so much as suggested a theory as to why Kentucky would want to invoke retirement eligibility as a ploy to discriminate against older employees, especially in the context of a plan that (as the EEOC acknowledges) otherwise "gives relatively favorable treatment to ... older hazardous duty workers ... who choose to retire voluntarily." Resp. 30 (emphasis omitted). Any such notion would be especially incongruous here, because Kentucky was free to adopt a much more direct way to disfavor older hazardous duty employees, if that is what it intended: The ADEA authorizes states to push all police officers and firefighters into retirement on their 55th birthday. *See* 29 U.S.C. § 623(j); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (upholding a mandatory retirement policy for police officers).

In trying to prove discriminatory intent, the EEOC focuses mainly on how "benefits are computed." Resp. 28. Specifically, the EEOC finds discriminatory intent in how Kentucky "us[es] imputation ... to increase the amount of benefits paid to disabled persons ... , by crediting them for

years that they might have worked if they had remained healthy." *Id.* (emphasis omitted).

The EEOC is mistaken. Any instance in which an older employee might receive lower benefits is not "because of [the employee's] age," but because of the employee's proximity to a legal eligibility milestone. Both the evident purpose of the statutory scheme and its structure confirm this conclusion. And the EEOC's repeated references to the statute's impact do nothing to prove an impermissible intent. We address each point in turn.

Purpose. The EEOC puts its finger on Kentucky's goal when it acknowledges that it would be "understandable" for Kentucky to act on an "impulse to ensure that all disabled employees have an adequate minimum level of benefits." Resp. 30 n.13. As the EEOC understands, Kentucky has made the judgment that employees who are further away from a retirement milestone deserve, and often need, a boost to reach a sustainable benefit level. Kentucky achieved this goal with an approach that reflects the reasonable expectations of the employees it wanted to attract. Based on the premise that employees of any age look to retirement eligibility as a critical juncture in their professional lives, Kentucky chose to impute to disabled employees the number of years they would have needed to reach that eligibility milestone (subject always to a cap based upon the number of years already served). J.A. 21-22.

That, of course, means that Kentucky does not award imputed years of service beyond age 55. In arguing that this is illegal, the EEOC misses a fundamental point about the overall structure of

the retirement statute. Younger workers must toil for 20 years in order to be eligible to collect retirement benefits. Kentucky recognized that most older employees will never make it that long, especially in a hazardous duty job. Confronted with this reality, Kentucky faced three choices: (1) fire its hazardous duty employees when they reach age 55, which Kentucky has full power to do, *see supra* at 6; (2) allow them to continue working past 55, but deny them any retirement benefits until they hit their 20th anniversary (treating them just like younger employees); or (3) allow them to work past 55 *and* treat them better than younger co-workers by allowing them to take normal retirement after serving as little as five years.

To the extraordinary benefit of older workers, Kentucky chose option 3. *See* NASRA Br. at 14. The EEOC's position is that when it comes to disability retirement, Kentucky must ignore the reality on which this benefit is premised—that most older workers will not serve 20 years—and assume the opposite. According to the EEOC, Kentucky cannot provide the accommodation of accelerated retirement without also compounding the benefit based on the premise that every older employee *would* have worked the full 20 years "had he remained healthy." Resp. 16; *see* Resp. 30 n.13. That approach would have been prohibitively expensive, it would have borne no relationship to the employees' expectations, and it would have given new meaning to the bromide about "good deeds." Nothing in the ADEA requires such a counterintuitive result. *See* NAC Br. at 19-20.

The EEOC responds by accusing Kentucky of using "favorable treatment of one class of older

workers" to "justify discrimination *against* a different class of workers." Resp. 31 (emphasis in original). Kentucky is doing no such thing. The group of employees that Kentucky is accused of discriminating against—older employees who will reach 55 before celebrating their 20th anniversary on the job—is the same as the group of employees that Kentucky went out of its way to benefit. Upon taking a job, and throughout his employment, no employee knows whether he will fall into the class of employees who will make it to normal retirement eligibility or the class that will become disabled before then. Older employees who take the job accept the highly advantageous upside of a more imminent retirement eligibility milestone—along with the security of disability benefits if they cannot make it to the milestone—but they take these benefits subject to the eminently fair correlative limitations on that particular route to retirement in the event of disability. *See generally* NAC Br. at 19.

Structure. The structural features of the statute enumerated in Kentucky's opening brief confirm that this imputation of service is not a manufactured ploy to differentiate among employees "because of ... age," but a legitimate distinction based on eligibility for retirement. *See* Pet'r 23-24. First, all the rules governing calculation of benefits apply in the same way to an employee who is closer to the 20-year milestone as to an employee who is closer to the age-based milestone. Pet'r 23. Second, for many employees—all those who are closer to the 20-year service milestone—age simply has no bearing on the amount of disability retirement benefits. *Id.* The same is true of any employee over 55 who has at

least 20 years of service; this case will have no effect on any employee who has over 20 years of service. Third, an older disabled employee could (and often does) fare better than a younger one with regard to the amount of disability benefits generally, and specifically with regard to the number of years imputed. *See* Pet'r 11 (example 3), 23-24; J.A. 94. All of these attributes bespeak an intention to focus on eligibility, not age *qua* age.

Impact. Without any evidence of *intent* to discriminate, the EEOC repeatedly tries to fill the void with evidence of the Kentucky statute's *impact*. The EEOC variously refers to "[t]he effect of the KRS plan," Resp. 12; to what a worker in certain "circumstances ... *may* receive," Resp. 25 (emphasis added); and to the supposedly "broad range of circumstances" in which a younger employee "will receive a higher benefit" than an older one who is similarly situated, Resp. 27 n.11; *see also* Resp. 6, 16-17, 18. All of this adds up to a concession that "the essence of [EEOC's] disparate-treatment claim in this case is that older disabled employees *will often* receive significantly lower retirement benefits than KRS would have awarded to a younger disabled worker with the same length of service." Resp. 20 (emphasis changed).

This is a contradiction in terms. The EEOC cannot prove its "disparate-treatment claim" with reference to the statute's "effect" or to what "will often" happen. *See Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 1002 (1988). If the EEOC thought it could prove disparate impact, it would have brought a disparate-impact case. Having declined even to allege disparate impact,

the EEOC cannot now prove intent by dousing its brief with an "essence" of impact.

C. The EEOC Is Incorrect in Assuming that Normal Retirement Benefits Are Inferior to Disability Retirement Benefits.

Completely apart from the invalidity of the legal test the EEOC applies, the EEOC's position fails for another reason: The EEOC cannot satisfy its own test, which is premised on demonstrating that Kentucky's age-based distinction is "a basis for paying older disabled employees *lower* benefits than similarly situated younger disabled workers." Resp. 27 (emphasis in original). In an effort to satisfy this test, the EEOC asserts at every turn that imputed service is a "*distinctly advantageous* feature of disability retirement," Resp. 18 (emphasis added), and that disability retirement benefits are "more generous" than normal retirement benefits, Resp. 28; *see* Resp. 15 (asserting "adverse treatment" for older employees).

The premise that pervades the EEOC's argument is false. Disability retirement benefits in Kentucky are not necessarily *superior* to normal retirement benefits; they are *different*. The simple reality is that no employer ever wants to design a plan that entices employees to claim a disability rather than working to (or taking) normal retirement.

To be sure, disability retirement includes some benefits—such as imputed years and certain other advantages under limited circumstances—that are unavailable to those taking normal retirement. But

there are many respects in which normal retirement is better.

First, a person who takes normal retirement retains the option of taking another job, whether in public service or in the private sector, without any reduction in benefits. KRS §§ 16.576(3), 16.582. An employee who takes disability, in contrast, can never return to a similar job—anywhere—if he wishes to hold onto disability retirement benefits. *See id.* §§ 16.582(1)(a), 16.645(25), 61.615.

Second, disability retirement benefits are subject to a cap of 20 years of service (actual or imputed), compared to normal retirement, in which the multiplier for service years is unlimited.

Third, disability retirement benefits, unlike normal retirement benefits, are subject to various offsets. In Kentucky, as in many other states, the disability payments are reduced by the amount of Social Security disability and workers compensation. *Id.* § 61.607. Consequently, even when a disability benefit appears to be higher than a normal retirement benefit, the net amount will often nevertheless be lower.

Fourth, Kentucky covers certain health insurance premiums in a way that is especially valuable to employees who take normal retirement. *Id.* § 61.702(3)(a). The percentage of the premium that Kentucky will cover is based on years of service. *Id.* For example, an employee with 20 years of service gets his insurance premiums covered in full. *Id.* But the imputed service that is awarded to a disabled retiree does not count toward the thresholds. *See id.* § 61.702(3). This means that, all else being equal, the employee on

normal retirement enjoys a valuable advantage over his disabled colleague. The differential is magnified because (1) health insurance premiums always increase over time; and (2) the subsidy is tax exempt, *see* 26 U.S.C. § 106, unlike retirement benefits, *see id.* § 61.

Fifth, an employee who takes normal retirement can avail himself of certain enhancements that are unavailable, or less favorable, to an employee who takes disability retirement. Foremost among them is the option to "purchase" additional years of service: Under certain circumstances—most notably when an employee has served in the military or in specified other government jobs—the employee can pay a bargain price to add more years onto his actual service and have those years treated as if the employee had actually worked them. KRS § 61.555; *see also id.* § 61.510(22). Purchased service, then, boosts the employee's retirement benefit and could push the employee across a threshold for free health benefits.

The Kentucky statute imposes no cap on the number of additional years of service that can be purchased by an otherwise qualified employee who takes normal retirement (although federal tax law might cap the benefit). *Id.* § 61.555. Not so for an employee on disability retirement, who is limited to a maximum of 20 years of service credit, whether actual service, imputed service, or purchased service. *Id.*; *see also id.* § 16.582.

Because of some of these advantages of normal retirement, Mr. Lickteig, the complainant who started this case, fares *better* under normal retirement than he would have fared had Kentucky

allowed him to collect the disability benefits he demanded. That is because Mr. Lickteig increased his benefits in two ways that would have been prohibited had he been allowed to take disability retirement: (1) he purchased nearly two more years of military service credit, J.A. 19 n.2 (citing KRS §§ 61.555, 78.545(6)); and (2) he worked an additional 11 months after his application for disability was denied, J.A. 18. Through these two steps, Mr. Licktieg enhanced his actual service of just under 18 years, thereby increasing his benefits over what he would have gotten had his request for disability retirement been granted.

More importantly, these two steps also pushed Mr. Lickteig across the 20-year threshold for free health insurance, J.A. 19, entitling him to have Kentucky pay his full health insurance premium in perpetuity. KRS § 61.702(3)(a). Had he been awarded disability retirement, he would not have crossed the threshold—because imputed years would not count toward health benefits—and he would be paying 25% of the ever-rising health insurance premiums for the rest of his life. *Id.* Thus, in an ironic twist, if the EEOC prevails, Mr. Lickteig will owe Kentucky a refund.

So which is better—normal retirement or disability retirement? The question cannot be answered in the abstract. Nor can it be answered from the face of the plan. It certainly cannot be answered by isolating one component of the package and ignoring the rest, as the EEOC tries to do. The answer always depends upon the idiosyncratic circumstances, needs, interests, values, and intentions of a particular employee.

This point underscores just how unworkable the EEOC's proposed rule is. A rule that age-based eligibility criteria are permissible when they are "more generous" to older workers, but facially illegal when they are not, Resp. 28, will inevitably devolve into the unanswerable question, "Which is better?"

II. THE EEOC HAS NOT ESTABLISHED A PRIMA FACIE CASE BECAUSE KENTUCKY'S RETIREMENT STATUTE DOES NOT "DISCRIMINATE," IN THAT ITS REFERENCE TO AGE IS NOT ARBITRARY.

The EEOC acknowledges that Congress did not intend to eliminate all age-based distinctions, but only "arbitrary" ones. Resp. 32; *see Gen. Dynamics*, 540 U.S. at 587; Pet'r 44. It also confirms that the concept derived from the Wirtz Report, which found a need to target a different "kind of discrimination" with regard to older workers. Resp. 33 n.14 (quoting Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 2 (1965) ("Wirtz Report")).

Nevertheless, the EEOC asserts that when Congress and this Court have emphasized this limitation, they have not thereby "requir[ed] a court to decide in each case whether a particular form of age-based disparate treatment reflects denigrating stereotypes." Resp. 32. According to the EEOC, what Congress meant was that any age-based distinction is necessarily "arbitrary," within the meaning of the ADEA, "unless the discrimination falls within one of the ADEA's specified statutory exceptions, such as the

exception for benefit plans that are justified by differences in cost." Resp. 34 (citing 29 U.S.C. § 623(f)(2)(B)(i)).

For at least two reasons this assertion is inconsistent with the history and language of the ADEA. First, the original version of the ADEA had the same (or very similar) defenses as Title VII, yet only in the ADEA did Congress emphasize that the prohibition was limited to "arbitrary" distinctions. *See* Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. Rich. L. Rev. 839, 880-82 (2004) (comparing differences in defenses available under Title VII and the ADEA). That must mean that the defenses, alone, do not define the limitation.

Second, the cost-justification defense cannot be what breathes meaning into Congress's 1967 reference to "arbitrary age discrimination." That ADEA-specific defense was added by the OWBPA in 1990.

In short, the only way to give effect to Congress's pronouncement that it was targeting only "arbitrary age discrimination" is to conclude that not every age-based distinction is prima facie illegal, but only those age-based distinctions that are arbitrary.

For reasons described in Kentucky's opening brief, Kentucky's retirement statute is not arbitrary. Pet'r 48-50.

III. LEGISLATIVE HISTORY AND POLICY RAMIFICATIONS SUPPORT KENTUCKY'S VIEW THAT AGE-BASED CRITERIA ARE NOT PER SE ILLEGAL IN RETIREMENT PLANS.

In support of its reading of the ADEA, the EEOC relies heavily on the origins and legislative history of the OWBPA and on certain policy ramifications. Both support Kentucky's view.

Legislative history. Everyone agrees that this Court's holding in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), was the major impetus behind the enactment of the OWBPA. *See* Pet'r 39-41. We all agree also that *Betts* effectively exempted virtually all benefits plans from age-discrimination claims.[2] That was what had Congress up in arms.

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[2] The EEOC quibbles with Kentucky's explanation of *how Betts* achieved this result. Resp. 39 n.17, 44 n.21. It is true, as the EEOC asserts, that one of the holdings in *Betts* was to constrict the phrase "compensation, terms, conditions, or privileges of employment," so as to remove fringe benefits plans from the ADEA's purview. Resp. 38-40. But, contrary to the EEOC's assertion, *Betts* also issued the equally controversial holding that "an employee benefit plan adopted prior to enactment of the ADEA cannot be a subterfuge," rejecting the argument that Congress, in 1978, had overruled a case articulating exactly that rationale. *Betts*, 492 U.S. at 168 (embracing rationale of *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977)); *see* Pet'r 40-41. Congress definitively overruled *both* holdings in the OWBPA. Either way, the bottom line is that Congress was concerned with rulings that purported to immunize virtually all benefits plans from the ADEA, not with the outcome for one specific plan.

The parties disagree over two points. The first is whether this Court intended to convey any view in *Betts* as to whether the specific plan at issue would have been adjudged illegal had it fallen within the ADEA's scope. The EEOC contends that that was "[t]he clear thrust of the Court's analysis," Resp. 42, while Kentucky has argued that this Court never reached the question, *see* Pet'r 40. On this point, the best evidence is the *Betts* opinion itself, which says nothing at all about whether the plan was illegal.

The second bone of contention is a related dispute over whether Congress in the OWBPA intended to declare the specific plan in *Betts* illegal, or whether it intended simply to ensure that that plan and others would not be categorically exempt from the ADEA's strictures. On this point, the best evidence is the statute Congress actually enacted, which the EEOC accurately describes in a single page. *See* Resp. 41. As is evident from the EEOC's own account, none of the broad-brush legislative fixes purported to do anything but subject all benefits plans to ADEA review. The actual legislation certainly does not prescribe any rules for assessing various forms of age-based criteria, much less any specific retirement plan.

All of which explains why the EEOC puts so much stock in quotes snatched from the legislative history. But these, too, furnish the EEOC no support. For the most part, these snippets confirm what the parties already agree upon: that Congress "'intend[ed] to make unmistakably clear that the ADEA's purpose'" was to "'eliminate[e] age discrimination in all forms of employee benefits,'" and that Congress intended to "'overturn[] both the

reasoning and the holding of the Court in *Betts*'"—about the categorical immunity of fringe benefits plans from the ADEA. Resp. 43 (quoting S. Rep. No. 101-263, at 17 (1990); H.R. Rep. No. 101-664, at 33 (1990)).

The rest of the quotes—two of them—are directed at proving a proposition that, as a general matter, Kentucky does not dispute. The proposition is that, generally, it is impermissible "to use pension-eligibility as a basis for denying an older worker any *other benefit.*" Resp. 44 (emphasis added) (quoting S. Rep. No. 101-263, at 23; H.R. Rep. No. 101-664, at 40).

The point here was the same one that is addressed earlier—and that Kentucky wholeheartedly endorses: Just as an employer may not refuse to give health benefits, or severance benefits, or comparable pay to employees over a specified age, the employer may not achieve the same end by using "'other proxies for age for example pension or Medicare eligibility.'" Resp. 45 (quoting 136 Cong. Rec. 27,058 (1990)); *see supra* at 4-5. As is evident from the lengthy discussion in both the Senate and the House Reports, Congress was addressing a problem that had been sweeping the nation: Financially strapped private employers were firing employees, especially in plant closings, and selectively refusing to pay severance or health benefits to the older ones, by announcing that anyone with a pension was not entitled to either benefit. *See* H.R. Rep. No. 101-664, at 33; S. Rep. No. 101-263, at 23. They were blatantly using retirement eligibility as a pretext to discriminate against older workers.

The EEOC does not point to any portion of the legislative history addressing the issue presented here, where: (1) the disability retirement benefits were part and parcel of the retirement plan with numerous complementary features; (2) age is a factor in determining eligibility, but does not alone dictate any outcome; and (3) there is no reason to suspect that retirement eligibility is a pretext for age discrimination.

Policy ramifications. The EEOC never explains why, as a matter of sound policy, Congress would have wanted to invalidate retirement plans with these attributes. The only argument it offers is the concern—already rebutted above—that validating Kentucky's retirement statute here would be an invitation to rampant abuse. Resp. 26; *see supra* at 4-5. There is no cause for alarm because: (1) courts are perfectly capable of distinguishing rational linkages to age-based criteria from pretexts; (2) when an employer really does engage in such an artifice, there is a good chance extrinsic evidence will expose the motive; and (3) a plan motivated by such an intent will almost certainly yield a disparate impact of the sort that the EEOC could not even bring itself to allege in this case.

What the EEOC ignores, however, are all the reasons why Congress would never have wanted to invalidate plans like Kentucky's. Many states and local governments have retirement plans that have the same features as Kentucky's. *See* NASRA Br. at 8 & n.9 (citing examples). As several especially knowledgeable amici explain, invalidating Kentucky's plan could have "catastrophic ... results." *Id.* at 13-14. Such a ruling would

destabilize public pension plans by: "(1) upset[ting] the actuarial assumptions on which states make funding decisions; (2) lead[ing] to huge expenses in designing, managing and protecting these plans; (3) requir[ing] fundamental constitutional and statutory changes in virtually every state in the U.S.; and (4) foster[ing] uncertainty in the national financial markets." *Id.* at 8-9.

In many states where such a plan is struck, the liability will be crippling, because the state cannot rejigger the benefits retroactively. *See* States Br. at 11 & n.28; NASRA Br. at 11 n.12 (25 states have constitutional protections and many other protect the rights contractually).

The more profound impact, however, will be prospective. If Kentucky's approach is illegal, "then it would be virtually impossible to provide any meaningful *disability* retirement for young workers (with a minimum amount of actual service years) and at the same time provide a meaningful *normal* retirement to older workers (with a minimum amount of actual service years)." NASRA Br. at 9 n.9 (emphasis added). As Chief Judge Boggs noted, even after "extensive questioning ... at oral argument," the EEOC could not come up with any alternative "way to provide this sensible result under [the EEOC's] reasoning." J.A. 92. The end result will almost certainly be to "eliminate pension benefits for millions of workers who begin public service late in life." NASRA Br. at 14. This is hardly the outcome Congress was hoping to achieve in the name of combating age discrimination.

The EEOC assures this Court that finding a prima facie case of discrimination "does not mean that [Kentucky's] plan ... necessarily violates the ADEA." Resp. 23. The EEOC suggests the Court should find comfort in the fact that Kentucky has asserted "the cost-justification defense in 29 U.S.C. 623(f)(2)(B)(i)," and "may press that claim on remand." Resp. 24; *see* Resp. 15. The EEOC neglects to mention that it has taken the position that this defense is legally unavailable to Kentucky—and, therefore, to numerous similar state plans—because the disability program is not a separate disability insurance plan. *See* EEOC Ct. App. Br. at 22. If the EEOC is right about the scope of the defense, then a holding that the EEOC has established a prima facie case here will necessarily spell the demise of numerous public retirement plans across the country. But even if the EEOC turns out to be wrong (as Kentucky believes), the uncertainty will lead plans to avoid the risk of crushing liability and revise their plans to be less favorable to older workers, or to disabled ones, just as Kentucky did while this case was pending on appeal. *See* J.A. 40-41 n.2, 65 n.2 (amending statute prospectively to make disability benefits far less favorable to all employees).

IV. THE EEOC'S INTERPRETATION IS NOT ENTITLED TO DEFERENCE.

The EEOC urges this Court to defer to its construction of the ADEA on two grounds. Resp. 46-49. Both are meritless.

The EEOC's first argument relies on a passage in 29 C.F.R. § 1625.10 (1989), defining the cost-justification defense, which applies only *after* a prima facie case has been proven. As the EEOC

admits, the regulation does not purport "to address the antecedent question whether particular plan provisions *are* facially discriminatory"—which is the question at issue in this case. Resp. 46. That ends the inquiry, since this Court cannot defer to a position an agency has not addressed.

Nevertheless, the EEOC asks the Court to defer to what it deems a "clear implication" from a single sentence. Putting aside the absence of any precedent for the proposition that this Court should defer to agency "implications," there is no such implication to be drawn. The sentence refers to a circumstance where the defense is unnecessary:

> Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of [the ADEA], and accordingly the practice does not have to be justified under [the defense].

29 C.F.R. § 1625.10(a)(2). From this, the EEOC somehow draws the illogical "implication" that the converse must be true—that "if an employee benefit plan does *not* 'provide[] the same level of benefits to older workers as to young workers,' the plan *will* [present a prima facie] violat[ion]" of the ADEA. Resp. 47. That is like interpreting the adage, "An apple a day keeps the doctor away," as a pronouncement that anyone who forgoes the daily allowance will be swarming with doctors.

Second, the EEOC argues that this Court should defer to a position the EEOC took in a compliance manual it published in October 2000. That manual does, indeed, support the EEOC's

position in this litigation. *See* 2 EEOC Compliance Manual No. 915.003, at 627:0009-10 (Oct. 3, 2000). That is unsurprising because the EEOC inserted the relevant passage into the compliance manual four years after the charge in this case was first filed with the EEOC and over a year after the EEOC brought this suit against Kentucky. Indeed, the manual recites the facts from its complaint in this case to illustrate a "facially discriminatory" retirement plan. *Compare id.* at 627:0009 *with* J.A. 9-15.

The EEOC's position on the compliance manual is doubly flawed. As an initial matter, this Court does not defer to manuals and guidelines that lack the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991). Moreover "[d]eference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); *see In re GWI PCS 1, Inc.*, 230 F.3d 788, 807 (5th Cir. 2000).

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

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In the Supreme Court of the United States

Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff's Department.

Petitioners,

v

Equal Employment Opportunity Commission.

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF MICHIGAN, MARYLAND, NEW MEXICO, SOUTH CAROLINA, TENNESSEE, WEST VIRGINIA AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

This case involves the State of Kentucky's public employee retirement plan that includes normal and disability retirement benefits. A public employee who is eligible for retirement benefits based on attained age plus a minimum service requirement or based on years of service alone, is not eligible for disability retirement benefits. Because age may be a factor in determining eligibility for normal retirement benefits, it may be a factor in determining eligibility for disability retirement. The calculation of disability retirement benefits is based upon actual years of service plus the number of years remaining before the member reaches retirement age or eligibility based on years of service alone. Thus, age may be an indirect factor in determining the amount of disability retirement benefits. The question presented in the Petition is:

Whether any use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act?

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INTEREST OF THE AMICUS CURIAE

The issue presented is whether the State of Kentucky's retirement statute violates the Age Discrimination in Employment Act, (ADEA) 29 USC 621 *et seq*. Specifically, under Kentucky's statute a member is eligible for normal retirement benefits if he or she has 20 years of service or is age 55 with five years of service. A disability retirement is designed to replace a normal retirement if the member becomes disabled and can no longer work and is not yet eligible for a normal retirement. However, a member who is eligible for a normal retirement may not receive a disability retirement since he or she is already entitled to a retirement benefit. In calculating Kentucky's disability retirement benefit, it is assumed that the member would have worked to the normal retirement age of 55. Thus, a disabled member is given service credit of up to 20 years or until he or she reaches age 55.

States have an interest in enacting retirement laws that best meet the needs of their citizens without undue interference or disruption. Michigan and the undersigned States are concerned that the decision of the Court of Appeals,[1] which found that Kentucky's statute was discriminatory, will adversely impact their ability to enact retirement statutes that best meet their respective needs and the needs of their employees. Consequently, they file this amicus brief asking this Court to grant the Petition and reverse the Court of Appeals.

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[1] *Equal Employment Opportunity Commission v Jefferson County Sheriff's Department, Kentucky Retirement Systems and the Commonwealth of Kentucky*, 467 F 3d 571 (CA6 2006).

SUMMARY OF ARGUMENT

The ADEA was enacted by Congress to prohibit employers from terminating older workers for no reason except their age and from refusing to hire older workers simply because of their age. Kentucky's Retirement plan does neither of these. Instead, it seeks to ensure that all public employees in Kentucky are provided a benefit regardless of their age, when they're no longer able to work. Because Kentucky's Retirement Plan uses other reasonable factors besides the age of the employee to determine the benefit to be given to disabled employees, the Kentucky statute does not violate the ADEA.

REASONS FOR GRANTING THE PETITION

I. The Kentucky Statute does not violate the Age Discrimination in Employment Act.

The ADEA plainly states its purpose is to[2]:

> promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

The report of Secretary of Labor Wirtz, which was the basis for the enactment of ADEA, defined arbitrary age discrimination as "assumptions about the effect of age on [an employee's] ability to do a job when there is in fact no basis for these assumptions."[3]

As this Court has stated[4]:

> Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

The Kentucky Retirement Plan does not violate the ADEA because it is neither contrary to the purpose of the ADEA nor does it discriminate against a public employee covered by the retirement plan based upon his or her ability to do a job. Instead, the retirement plan provides a benefit to employees when they can no longer perform their jobs, regardless of age. In other words, any employee who can no longer work receives either a

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[2] 29 USC 621(b). (Emphasis added.)

[3] *Equal Employment Opportunity Commission*, 467 F 3d at 577.

[4] *Hazen Paper Company v Biggins*, 507 US 604; 610; 113 S Ct 1701; 123 L Ed 2d 338 (1993).

disability retirement or a normal retirement, both of which are calculated in the same manner, except it is assumed that the disabled member would have continued working until retirement age.

The United States Court of Appeals for the Sixth Circuit viewed the EEOC's claim as one of disparate treatment discrimination. This Court, however, in *Hazen Paper v Biggins*, held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."[5] Here, the employee's age is not the motivating factor in Kentucky's Retirement Plan.

The factor motivating Kentucky in its retirement plan, is to provide a similar level of protection to all members regardless of their age. Indeed the effect of Kentucky's Retirement Plan and its ability to ensure a benefit to all covered employees is one of age neutrality. Kentucky reaches this goal by providing retirement protection to an employee who either retires after attaining sufficient service and age benchmarks or who cannot work due to disability. If the employee already qualifies for a normal retirement due to his age and years of service, then that motive or purpose is achieved and there is no reason to have that person apply for a disability retirement.

The facts here establish that Mr. Lickteig became disabled when he was 61 years old after 17 years of service. He was not given service disability credit of 20 years because he was already eligible for a normal retirement benefit after 17 years of service. As noted, the overriding purpose of Kentucky's Retirement Plan is to ensure that a benefit is provided to employees who either become disabled and can no longer work or who have worked long enough to become eligible for a benefit under a normal retirement. Here that purpose was met since Mr. Lickteig was eligible for a normal retirement.

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[5] *Hazen Paper Company*, 507 US at 609.

This Court has held in a disparate treatment case that "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."[6] But here there is no proof of discriminatory motive in Kentucky's Retirement Plan. The Retirement Plan simply says that a person who qualifies for a normal retirement can't receive a disability retirement when he or she already has earned a normal retirement. As this Court held in *Hazen*, "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service."[7]

This Court's decision in *Smith v City of Jackson* is instructive.[8] In *Smith* the city gave a higher percentage pay raise to police officers with less than 5 years of service than to other police officers. Most police officers with more than 5 years of service were older. These officers sued, claiming that they were discriminated against because of their age. This Court held that the ADEA does not prohibit action where the differentiation in treatment was based on reasonable factors other than age discrimination.[9] The Court found that the difference in the percentage of pay increase was reasonably related to the City's "perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market."[10] As a result, this Court affirmed the dismissal of the Plaintiff's complaint.

Likewise, Kentucky's Retirement Plan is intended to provide a benefit to employees who can no longer work. It is not intended to discriminate against older workers, but rather seeks to ensure

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[6] *Teamsters v United States*, 431 US 324, 335, n15; 52 L Ed 2d 396; 97 S Ct 1843 (1977) quoted with approval in *Hazen Paper Company*, 507 US at 609.

[7] *Hazen Paper Company*, 507 US at 613.

[8] *Smith v City of Jackson*, 544 US 228; 125 S Ct 1536; 161 L Ed 2d 410 (2005).

[9] *Smith*, 544 US at 238, 241.

[10] *Smith*, 544 US at 242.

that a covered employee receives some benefit if he or she can't work, regardless of his or her age. Kentucky's plan has nothing to do with discrimination against older workers who are seeking a job or who wish to retain their job. Instead, Kentucky's Retirement Plan is an attempt to assist employees who can no longer perform their job due to a disability. Accordingly, this Court should grant Kentucky's Petition and reverse decision of the Court of Appeals.

II. Implications of the Interpretation given by the Court of Appeals.

The Court of Appeals' decision has untold adverse implications for the retirement systems of many States that have retirement plans. This is because the Court of Appeals has held that a retirement plan that merely uses age as one of the factors to determine the amount and eligibility for a particular benefit is subject to challenge on the basis that it is discriminatory. However, the Kentucky Retirement Plan is a reasoned decision of the Kentucky Legislature. Kentucky's Retirement Plan, like the retirement plans enacted by other States for their respective public employees, were enacted to meet the needs of the governmental employees and the State.

What the Court of Appeals failed to recognize or fully understand is that *all* retirement benefits are not equal among *all* employees. In Kentucky, as in most States, the more years that a person works and the higher a person's salary, the larger his or her pension will be. A 60-year-old person could have worked for 30 years at a secretarial position and not receive as much in retirement as a 55-year-old department director with only 10 years of service. This doesn't mean that the statute discriminates against the 60-year old employee, it only means that other factors such as date of hire and pay rate also determine retirement amount.

Under Kentucky's Retirement Plan, if a 25-year-old employee becomes disabled after the fifth year of employment, he or she

will only be credited with 10 years of service. His or her benefit will be based on 10 years, even though he or she may have intended to work for 35 years and receive a normal retirement benefit at age 55. In the case of Mr. Lickteig while he did not receive a "full" disability retirement benefit of 20 years, he nonetheless is eligible to receive a normal retirement benefit due to a combination of his age and his years of service. Mr. Lickteig has not suffered age discrimination with respect to his eligibility or ability to receive a benefit. Rather, the purpose of Kentucky's statute is to ensure that those who become disabled receive a benefit. Neither that purpose nor Kentucky's method of achieving that purpose, as contained in its retirement plan, violate the ADEA.

CONCLUSION

The Petition For A Writ of Certiorari should be granted.

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In The
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KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY, AND JEFFERSON COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF STATE RETIREMENT ADMINISTRATORS ("NASRA") AND THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS ("NCPERS") AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Petitioners have asked this court to grant a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals, *en banc*, as to whether the use of "age" as a factor in a state retirement plan renders the plan facially discriminatory under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*.

SUPREME COURT RULE 29.6
CORPORATE DISCLOSURE STATEMENT

The National Conference on Public Employee Retirement Systems (NCPERS) pursuant to Supreme Court Rule 29.6 files this "Corporate Disclosure Statement" and shows that it has no parent corporation and no publicly held company owns 10% or more of its stock.

The National Association of State Retirement Administrators (NASRA) pursuant to Supreme Court Rule 29.6 files this "Corporate Disclosure Statement" and shows that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE*[1]

The National Conference on Public Employee Retirement Systems (hereinafter "NCPERS") and the National Association of State Retirement Administrators (hereinafter "NASRA") are national organizations focused on the preservation, growth and stability of public pension plans and funds. The decision of the Sixth Circuit Court of Appeals in *EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006) undermines and frustrates these goals.

NASRA is a non-profit association whose members are the directors of this nation's state, territorial and largest statewide public retirement systems. These systems hold nearly two trillion dollars in assets that provide pension and other benefits to more than two-thirds of all state and local government employees. In addition to its membership, NASRA also has approximately 200 associate members. Associate members are private sector firms that work with governmental retirement systems.

Among other functions, NASRA maintains a standing survey of key characteristics of public retirement systems

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[1] The parties have consented to the filing of this brief and letters reflecting that consent have been filed with the Clerk of the Supreme Court as required by Supreme Court Rule 37.2. Further as required by Supreme Court Rule 37.6, counsel certifies that this Brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae*, their members or undersigned counsel made a monetary contribution to the preparation or submission of this Brief. It should be noted that Robert D. Klausner, counsel of record for the Petitioners, is general counsel to *Amici*, NCPERS and NASRA. However, he did not participate in the preparation or submission of this Brief or make any monetary contribution toward its submission or preparation.

and maintains a clearinghouse of information and resources pertinent to public retirement administration and policy.[2]

The National Conference on Public Employee Retirement Systems (hereinafter "NCPERS") is the largest national non-profit public pension advocacy organization, representing over 500 governmental pension funds having assets in excess of two trillion dollars. NCPERS was founded in 1941 to protect the pensions of public employees by representing public pension organizations on Capitol Hill, providing trustee education and providing essential pension information to trustees, administrators and public officials.[3]

Amici and their member funds representing significant assets and millions of citizens have an interest in this matter and will be adversely affected by the decision rendered by the Sixth Circuit *en banc* in this case. The circuit court's determination ultimately broadens the scope of the ADEA as it affects state and local governmental pension plans and will inevitably lead to additional litigation and concomitant expense in designing, preserving and protecting public pension funds. Likewise, as a result of the decision, member plans may be forced to modify or reduce retirement benefits to millions of public employees nationwide in conflict with state constitutional guarantees.

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[2] General information concerning NASRA as well as specific data regarding its activities can be found at its website, www.nasra.org.

[3] General information concerning NCPERS as well as specific data regarding its activities can be found at its website, www.ncpers.org.

SUMMARY OF ARGUMENT

The issues presented in this case merit review by this Court as: (1) the decision of the Sixth Circuit will lead to instability in the design, management and protection of public retirement funds; (2) under the *en banc* analysis virtually all pension plans would be "on their face" discriminatory solely because they contain a reference to "age"; (3) the Sixth Circuit's analysis is contrary to this Court's decision in *Hazen;* (4) the decision has widespread adverse fiscal implications; and (5) the decision violates principles of federalism.

If the Writ is not granted, the nation's state and local retirement systems will be forced to act to their detriment based merely on the denial of the Motion for Summary Judgment. This court should grant the Petition for Writ of Certiorari to address these issues now in order to forestall the otherwise inevitable adverse reaction of the states to the Sixth Circuit's decision. Further, as the Sixth Circuit *en banc* decision is contrary to this Court's analysis of "disparate treatment" cases under the ADEA, review is proper under Supreme Court Rule 10.

ARGUMENT

1. THE DECISION OF THE SIXTH CIRCUIT WILL LEAD TO INSTABILITY IN THE DESIGN, MANAGEMENT AND PROTECTION OF PUBLIC RETIREMENT FUNDS.

There are more than 20 million working and retired state and local government employees in the United States. Retired public employees live in virtually every city and town in the nation (90% retire and remain in the

same jurisdiction where they worked). Active public employees comprise more than 10% of the nation's workforce and two-thirds are employed in education, public safety, corrections and the judiciary. Retention of experienced and trained personnel in these positions is critical to the continuous and reliable delivery of public services.[4]

Public pension plans distribute more than $140 billion annually (an amount greater than the total economic output of 22 states) in benefits to nearly seven million retirees, beneficiaries and other recipients with an average pension benefit of roughly $20,400 annually. These payments are steady and continuous and provide a robust economic stimulus to local economies throughout the nation. Studies indicate that public pension funds and the benefits they distribute make important contributions to the local, state and national economies. Likewise, the assets of these plans are an important source of liquidity and stability for the nation's financial markets.[5]

Further, while private sector plans are subject to federal regulation through ERISA, state and local governmental plans are creatures of state constitutional, statutory and case law. These governmental plans must comply with a vast landscape of state and local requirements as well as industry accounting standards. These plans are accountable to the legislative and executive branches of the state; independent boards of trustees that

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[4] Data and statistics obtained from NASRA are generally available through its website at www.nasra.org. *See*, generally, the resources section of NASRA website. The site also has available general statistics and studies regarding retirees and retirement systems across the nation.

[5] *See*, Footnote 4, *supra*.

include employee representatives; and ultimately the taxpaying public.[6]

The Sixth Circuit's finding that a public retirement plan is facially discriminatory simply because it considers age as a correlating factor in its retirement benefit formula undermines the funding and benefit framework of the nation's public pension plans. These public pension plans, upon which millions of retirees and their beneficiaries depend, will be subjected to great instability as the decision will: (1) upset the actuarial assumptions on which the states make funding decisions; (2) lead to huge expenses in designing, managing and protecting these plans; (3) require fundamental constitutional changes in virtually every state in the U.S.; and (4) foster uncertainty in the national financial markets as the plans attempt to discern the status of the law and come into compliance with it.

The Sixth Circuit's decision may also open the floodgates for a multitude of claims which could cripple retirement programs. The EEOC in the case now under consideration has sought damages including back benefits with pre-judgment interest dating to 1992. If the thousands of public pension plans nationwide are now subject to suit, literally billions of dollars of state and local pension funds will be at risk. Public pension plans should not be thrown open to scrutiny and found discriminatory simply because "age" is utilized as a factor in the plan. Clearly, the failure by this Court to grant this writ could have catastrophic and destabilizing results.

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[6] *See*, Footnote 4, *supra*.

2. THE USE OF "AGE" AS A FACTOR IN A RETIREMENT PLAN DOES NOT RENDER THE PLAN DISCRIMINATORY UNDER THE ADEA.

The *en banc* decision of the Sixth Circuit finds that a Kentucky retirement plan is "facially discriminatory" simply because "age" is a factor in determining eligibility for a disability pension under the plan.[7] The ruling will in effect force retirement plans across the nation to review and re-design their retirement plans. Further, the review and re-design will be no easy task as (1) most pension plan benefits are guaranteed in the state's constitution; and (2) the plan can make no reference to age without such reference being deemed "facially discriminatory," making actuarial analysis virtually impossible. Thus, under the "disparate treatment" analysis used by the Sixth Circuit, virtually all plans would be facially discriminatory as the mere reference to age in a retirement plan will establish a "prima facie" case of age discrimination under the ADEA.

The Sixth Circuit's ruling threatens all pension plans, in as much as all use "age" as a factor in determining retirement eligibility. Clearly, the ADEA, even as amended by the OWBPA in 1990, permits the establishment of a normal retirement age. Further, age is always a factor in establishing retirement eligibility, along with years of service and the kind or type of service rendered.

Ironically, the effect of the Sixth Circuit's decision will be to harm older workers. Under the Kentucky plan at issue in this case, a hazardous duty worker is vested and eligible to retire after reaching age 55 with five (5) years of

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[7] The worker in this case was eligible for normal retirement benefits based on his age and years of service.

service. If Kentucky is forced to modify its plan and revert to a straight "years of service" formula, workers who begin work later in life will never receive a pension because actuarily it would be cost prohibitive to provide retirement benefits to all workers with five (5) years of service who retire at any age.

The Kentucky formula actually encourages the hiring of older workers, consistent with the congressionally stated purpose of the ADEA, because the older workers, even with limited service, can still receive a pension. Under a strict "years of service" formula (with no allowance for reference to age) it would be financially impossible to offer a lifetime pension to workers who begin service late in life, because it is not possible to offer a younger worker with five (5) years of service a similar lifetime pension.

This Court should grant the writ application to review and consider the practical effect of the Sixth Circuit's decision, which is to eliminate pension benefits for millions of workers who begin public service late in life.

3. THE SIXTH CIRCUIT DECISION IS CONTRARY TO THE HOLDING OF THIS COURT IN *HAZEN*.[8]

The Sixth Circuit analyzes this case as one of "disparate treatment" not one of disparate impact.[9] The Sixth

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[8] *Hazen Paper v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

[9] Under *Hazen*, in "disparate treatment" cases liability depends on whether the protected trait, i.e. age, actually motivated the employer's decision. In other words, the protected trait (age) must have actually played a role in and had a determinative influence on the employer's decision. In contrast, "disparate impact" claims under the ADEA may be

(Continued on following page)

Circuit *en banc* found the Kentucky plan to be "facially discriminatory" so that no additional proof of discriminatory intent or motive was necessary, as motive and intent were directly evidenced by the facially discriminatory nature of the policy itself. *See,* 467 F.3d at 578-579, 580-582.(The decision is also included in the "Appendix" to Petitioner's Brief.) More importantly, the Sixth Circuit *en banc* decision holds that "an employer's intent to discriminate is directly evidenced by the employer's writing or adoption of a facially discriminatory employment policy."[10] 467 F.3d at 580.

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established without demonstration of discriminatory motive or intent. *See, Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). Disparate treatment and disparate impact cases are fundamentally different. As Justice O'Connor wrote in *Hazen*, this Court "has long distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." 507 U.S. at 607.

In the instant case, the EEOC has alleged a "disparate treatment" claim under the ADEA. Nonetheless, the Sixth Circuit has applied a "disparate impact" analysis to this "disparate treatment" claim. *Smith*, in which this Court first recognized ADEA "disparate impact" claims, recognizes that an employer has defenses in "disparate impact" cases and may base his decision or plan on "reasonable factors other than age." *See*, 29 U.S.C. § 623(f)(1). Even utilizing a "disparate impact" analysis, Kentucky put forth sufficient evidence to establish a Reasonable Factors Other than Age ("RFOA") defense, which evidence the Sixth Circuit erroneously disallowed or ignored.

[10] It is unclear from the Sixth Circuit *en banc* decision whether the burden of production, burden of proof or burden of persuasion in an ADEA "disparate treatment" case has been affected. Petitioners in connection with their Motion for Summary Judgment put forth sufficient evidence to demonstrate that there were legitimate "factors other than age" which were considered in establishing the disability and regular retirement plans and in establishing the participants' eligibility criteria and requirements. As Chief Judge Botts notes in the dissent, age was merely a correlating factor in establishing eligibility, not the motivating factor. Despite this showing by Petitioners, the *en banc* panel held there was a "prima facie" showing of discrimination

(Continued on following page)

The decision is in direct conflict with *Hazen* where this Court stated:

> in a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment to employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."

Hazen, 507 U.S. at 609 (citations omitted).

In this case, it appears that age was nothing more than an incidental or correlating factor. It was not the motivating factor for the Kentucky plan. As the District Court noted in its granting of Summary Judgment and dismissal of the EEOC complaint: "Again, age will always be a factor in retirement plans. The fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a

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(which was apparently unrebutted by the Petitioner's evidence). Accordingly, the Sixth Circuit remanded the matter to the District Court for further consideration. To the extent the *en banc* decision may affect and upset long lines of decisions of other Circuits and this Court regarding available defenses, burden of proof, burden of production or the burden of persuasion in ADEA "disparate treatment" claims, this Court should grant the Petitioner's writ application in order to consider and clarify the issue.

mask used to hide discrimination."[11] For the Sixth Circuit to find the plan facially discriminatory violates the "disparate treatment" analysis laid out by this Court in *Hazen*. Neither the intent nor the letter of the ADEA is violated by a retirement plan's making reference to age when this is merely a correlating factor or an actuarial reality. This court should grant the writ application in accordance with Supreme Court Rule 10 to insure the decision conforms to its holding in *Hazen* and other "disparate treatment" cases under the ADEA.

4. THIS COURT SHOULD CONSIDER THE ADVERSE FISCAL CONSIDERATIONS WHICH FLOW FROM THE DECISION.

The Sixth Circuit in the instant matter seems concerned that Kentucky engages in the typical practice of not permitting persons who have already reached normal retirement age to receive disability benefits. Many plans nationwide actually convert disability retirees to normal retirement status upon attainment of normal retirement age, provided that no reduction in benefit payments occurs.

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[11] *See*, "Order" of the United States District Court for the Western District of Kentucky, filed September 3, 2003, Granting Kentucky's Motion for Summary Judgment and Dismissing the EEOC complaint. The "Order" is attached as an "Appendix" to Petitioner's Brief and the quote is from page 46a as contained in the Appendix. *See also, Lyon v. Ohio Education Ass'n and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995) which found that imputation of service years in a retirement plan was not discriminatory but a reflection of an "actuarial reality." *Id.* at 140. The *en banc* decision from which Petitioner's seek review partially overrules *Lyon*.

This practice is consistent with the purpose of disability benefits, particularly for public safety employees injured in the course and scope of hazardous duty. Without disability benefits, public safety officers injured on the job would be unable to survive financially until normal retirement age. Disability payments thus provide a needed bridge from active paid service to normal retirement.

The ADEA as amended by the OWBPA specifically permits states to establish a normal retirement age. Further, Congress has recognized that public servants in hazardous duty situations may have a lower retirement age than regular state employees and as a result has seen fit to eliminate the Internal Revenue Code Section 72t penalty for early withdrawal from retirement plans for public safety officers who retire after age 50. For regular employees, the Congress has set normal retirement age for the 72t penalty at 59½, or age 55 in the case of a separation from service.

Similarly, Congress has seen fit to tax disability benefits differently from normal retirement benefits. While the latter are generally taxable as ordinary income, the former are exempt from tax under IRC section 105. Forcing states to provide disability benefits in lieu of normal retirement benefits after a worker reaches normal retirement age will have a direct negative effect on the public fisc, contrary to the express intent of Congress.

Thus, aside from the fiscal impact of the Sixth Circuit decision on the states, the decision affects the federal treasury as well.

5. THE SIXTH CIRCUIT DECISION VIOLATES PRINCIPLES OF FEDERALISM.

The ADEA defines an "employer" to include a state and a political subdivision of a state but not the United States. 29 U.S.C. § 630(b). However, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), this Court held that although Congress intended the ADEA to abrogate the States' Eleventh Amendment immunity, this abrogation exceeded Congress' authority under the Fourteenth Amendment. Specifically, this Court held that Congress could not impose certain substantive requirements on state and local governments when such requirements were disproportionate to any unconstitutional conduct which could be targeted under the ADEA.[12]

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), a 1989 decision of this Court, was legislatively modified by the OWBPA on the limited finding of Congress that younger workers could not be afforded a specific benefit which was not available to older workers. Contrary to the implied finding of the Sixth Circuit, OWBPA does not generally abrogate well established principles of federalism which discourage the federal government from

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[12] *Kimel* is an important decision in recognizing, upholding and furthering the principles of federalism. The decision centers on the Court's review of the Congressional intent and purpose in passing the ADEA and the power of Congress to abrogate the States' sovereign immunity under the Eleventh and Fourteenth Amendments to the United States Constitution. The Court ultimately held the ADEA's abrogation of state immunity invalid under Section 5 of the Fourteenth Amendment by disallowing suits against states by individuals under the ADEA in federal court.

interfering with the traditional police powers reserved to the states.

The decision of the Sixth Circuit turns federalism on its head and forces the states to show that their policies in the traditional area of state law enforcement do not violate non-binding guidelines issued by the EEOC.[13] This is an area which has always been strictly construed in favor of the states, and this Court has never gone so far as to abrogate state sovereignty in favor of a federal agency's guidelines which have not attained the force of law.

The Tenth Amendment to the United States Constitution confirms the state's status as a sovereign. In deference to the sovereignty of the state, the federal government can neither: "issue directives requiring the states to address particular problems nor command the state's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."

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[13] It is clear the EEOC has rule making authority under the ADEA. However, rather than engaging in rulemaking, the EEOC issues "guidelines" concerning the interpretation of and compliance with the ADEA. In the instant case, the EEOC filed suit against Kentucky in 1999 and issued a "policy manual" in 2000 in which the EEOC criticized Kentucky for being out of compliance with EEOC guidelines. However, ADEA guidelines as issued by the EEOC are only statements of EEOC policy and do not comply with the legal requirements for rulemaking. The force and effect of such guidelines is merely a function of their persuasive effect. *Christensen v. Harris County*, 529 U.S. 576, 586 (2000). Further, no deference is due to agency interpretations at odds with the plain language of the statute itself. The EEOC brought suit against Kentucky based solely on a then-unissued EEOC staff interpretation of an ADEA provision, in a transparent attempt to bully the sovereign State of Kentucky into adopting the EEOC's staff interpretation of the law, without any true law making, formal publication or opportunity for public comment. This is directly at odds with the proper functioning of our federal system.

Printz v. United States, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).[14]

Through its enforcement actions, guidelines and advisory directives, the EEOC has sought in this and other enforcement actions to dictate to the states how to design and structure their public retirement plans. This is an affront to federalism principles embodied in the Tenth Amendment to the U.S. Constitution. Likewise, the efforts of the EEOC undermine and frustrate a vast array of state constitutional and legislative provisions specifically involved with the establishment, design, funding and maintenance of these public retirement systems. The employment and payment of state officers enforcing the plenary police powers of a state is paramount to the sovereignty of that state.

The power of a state to regulate its own citizenry and to regulate relationships with its own employees and retirees is essential element of our system of federalism. Congress recognized this in exempting public retirement plans from the scope of ERISA in 1974.[15]

Likewise, this Court should strictly scrutinize decisions expanding the scope and application of the ADEA as

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[14] In *Printz*, this Court found that the obligation to conduct background checks imposed on sheriff's by a federal gun law (the Brady Bill) was unconstitutional as it required the states to administer a federal regulatory program. Specifically, the law was violative of the principles of dual sovereignty established and contained in the U.S. constitution.

[15] *See*, 29 U.S.C. § 1003(b)(1).

it affects public retirement systems and particularly plan design and participant eligibility.

CONCLUSION

For the above and foregoing reasons, *Amici Curiae* urge that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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53076B

101 No. 06-1037

In The

Supreme Court of the United States

Kentucky Retirement Systems,
Commonwealth of Kentucky, and
Jefferson County Sheriff's Department,
Petitioners,

v.

Equal Employment Opportunity Commission,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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U.S. DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
CASE NO. 3:99-CV-00500-JVC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — PLAINTIFF

v.

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY — DEFENDANTS

RELEVANT DOCKET ENTRIES

Filing Date	Docket No.	Docket Text
08/02/1999	1	COMPLAINT filed (Entered: 08/02/1999)
08/24/1999	2	ANSWER by defendant KY Commonwealth (Entered: 08/25/1999)
08/25/1999	3	ANSWER by defendant Jefferson Cty Sherif (Entered: 08/25/1999)
08/25/1999	4	ANSWER by defendant KY Retirement Systems (Entered: 08/25/1999)
12/02/2002	72	MOTION by plaintiff EEOC for summary judgment; memorandum in support; order

Filing Date	Docket No.	Docket Text
		tendered (Entered: 12/02/2002)
04/07/2003	99	RESPONSE by defendant KY Retirement Systems to motion for summary judgment and memo in support of cross-motion for summary judgment (Entered: 04/08/2003)
04/07/2003	100	CROSS-MOTION by defendant KY Retirement Systems for summary judgment; memorandum in support; deposition of Thomas Levy (Entered: 04/08/2003)
04/07/2003	101	AFFIDAVIT of William P. Hanes (Entered: 04/08/2003)
06/09/2003	106	RESPONSE by plaintiff EEOC to cross-motion for summary judgment; attachments; order tendered (Entered: 06/09/2003)
06/09/2003	106	REPLY by plaintiff EEOC to response to motion for summary judgment (Entered: 06/09/2003)

Filing Date	Docket No.	Docket Text
06/25/2003	114	REPLY by defendant KY Retirement Systems to response to motion for summary judgment (Entered: 06/26/2003)
09/04/2003	136	ORDER by Judge Jennifer B. Coffman on 9/3/2003; denying [72] Motion for Summary Judgment. Granting [100] dfts. Motion for Summary Judgment, the pla. claims are DISMISSED w/prejudice. As the pla. claims against the other dfts. are identical and based upon the same statutory language, and the Ct. has found that there were no violations of the ADEA, IT IS FURTHER ORDERED that the pla. claims against the Commonwealth of KY & Jeff. Cty Sheriff's Office are also DISMISSED w/prej (Entered: 09/04/2003)
09/04/2003	137	JUDGMENT by Judge Jennifer B. Coffman on 9/3/2003; in favor of dft. KY Retirement Systems

Filing Date	Docket No.	Docket Text
		against Pla. This is a FINAL & APPEALABLE order, This matter is stricken from the Court's active docket. (Entered: 09/04/2003)
11/03/2003	138	NOTICE OF APPEAL as to Order on Motion for Summary Judgment by Equal Employment Opportunity Commission. (Entered: 11/03/2003)

U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT
#03-6437

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	PLAINTIFF-APPELLANT
v.	
JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY	DEFENDANT-APPELLEES

RELEVANT DOCKET ENTRIES

Filing Date	Description
11/04/2004	FINAL BRIEF filed by James D. Allen, C. Joseph Beavin, Lizbeth A. Tully and Robert D. Klausner for Appellee KY Retirement Sys; Mitchell L. Perry for Appellee Jefferson Cnty; D. Brent Irvin for Appellee Ky.
11/18/2004	FINAL BRIEF filed by Dori K. Bernstein for Appellant EEOC.
11/18/2004	FINAL REPLY BRIEF filed by Dori K. Bernstein for Appellant EEOC.
09/19/2005	OPINION filed: The judgment of the district court granting summary judgment in favor of Kentucky Retirement is AFFIRMED, decision

Filing Date	Description
	for publication pursuant to local rule 206 [03-6437]. John M. Rogers, Authoring Judge, Jeffrey S. Sutton, Circuit Judge, Gerald E. Rosen, District Judge for the Eastern District of Michigan, sitting by designation
09/19/2005	JUDGMENT: The judgment of the district court is AFFIRMED.
10/12/2005	PETITION for en banc rehearing filed by Dori K. Bernstein for Appellant EEOC.
11/23/2005	RESPONSE to a petition for en banc rehearing [3251099-1] filed by Dori K. Bernstein. Response filed by James D. Allen for Appellee KY Retirement Sys.
10/31/2006	OPINION filed: REVERSE the district court's grant of summary judgment to defendants and REMAND to the district court for further proceedings consistent with this opinion, decision for publication pursuant to local rule 206. [03-6437] Danny J. Boggs, Chief Judge dissenting, Boyce F. Martin, Circuit Judge, Alice M. Batchelder, Circuit Judge, Martha Daughtrey, Circuit Judge, Karen N. Moore, Authoring Judge, R.G. Cole, Circuit Judge, Eric L. Clay, Circuit Judge, Ronald L. Gilman, Circuit Judge, Julia S. Gibbons, Circuit Judge, John M.

Filing Date	Description
	Rogers, Circuit Judge concurring separately, Jeffrey S. Sutton, Circuit Judge, Deborah L. Cook, Circuit Judge, David W. McKeague, Circuit Judge, Richard A. Griffin, Circuit Judge.
10/31/2006	JUDGMENT: The granting of summary judgment to defendants by the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.
11/30/2006	ORDER filed granting motion to stay mandate [3480795-1] filed by Mitchell L. Perry, D. Brent Irvin, C. Joseph Beavin, Lizbeth A. Tully, Robert D. Klausner. [03-6437] Danny J. Boggs, Chief Judge, Boyce F. Martin, Circuit Judge, Alice M. Batchelder, Circuit Judge, Martha C. Daughtrey, Circuit Judge, Karen N. Moore, Circuit Judge, R.G. Cole, Circuit Judge, Eric L. Clay, Circuit Judge, Ronald L. Gilman, Circuit Judge, Julia S. Gibbons, Circuit Judge, John M. Rogers, Circuit Judge, Jeffrey S. Sutton, Circuit Judge, Deborah L. Cook, Circuit Judge, David W. McKeague, Circuit Judge, Richard A. Griffin, Circuit Judge.

Filing Date	Description
02/01/2007	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee KY Retirement Sys. Filed in the Supreme Court on 01-23-07, Supreme Ct. case number: 06-1037. [03-6437]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	)	
PLAINTIFF,	)	CIVIL ACTION NO. 3:99CV500(C)
v.	)	
JEFFERSON COUNTY SHERIFF'S OFFICE, KENTUCKY RETIREMENT SYSTEMS & THE COMMONWEALTH OF KENTUCKY	)	**COMPLAINT**
DEFENDANTS.	)	

NATURE OF THE ACTION

This is an action under the Age Discrimination in Employment Act to correct unlawful employment practices on the basis of age. This action seeks appropriate relief for Charles Lickteig and a class of individuals aggrieved by those unlawful employment practices. The Commission alleges that since at least October 16, 1992, Defendants have discriminated against a class of individuals age forty (40) or over on the basis of age by maintaining a disability retirement program which denies benefits or pays reduced benefits, because of age.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 7(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(b) (the "ADEA"), which incorporates by reference Section 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 217.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the Western District of Kentucky, Louisville Division.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. § 626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, and by Public Law 98-532 (1984), 98 Stat. 2705.

4. At all relevant times, Defendant Jefferson County Sheriff's Department, ("Sheriff's Department") has continuously been an agency or instrumentality of a political subdivision of the Commonwealth of Kentucky.

5. At all relevant times, Defendant Sheriff's Office has continuously been an employer within the meaning of Section 11(b) of the ADEA, 29 U.S.C. § 630(b).

6. At all relevant times, Defendant, Kentucky Retirement Systems, ("KRS") has continuously been an agency or instrumentality of the Commonwealth of Kentucky.

7. At all relevant times, Defendant KRS has continuously been an employer within the meaning of Section 11(b) of the ADEA, 29 U.S.C. § 630 (b).

8. At all relevant times, Defendant, Commonwealth of Kentucky ("Commonwealth") has been a State Government.

9. At all relevant times, Defendant Commonwealth has continuously been an employer within the meaning of Section 11(b) of the ADEA, 29 U.S.C. § 630(b).

CONCILIATION

10. Prior to institution of this lawsuit, the Commission's representatives attempted to eliminate the unlawful employment practices alleged below and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

STATEMENT OF CLAIMS

11. Since at least October 16, 1992, Defendants have engaged in unlawful employment practices, in violation of Section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), by maintaining a disability retirement program which discriminates on the basis of age against a class of individuals age forty (40) or older, by denying disability retirement benefits to those over the age of 55 (hazardous) or 65 (nonhazardous) and by paying lower disability retirement benefits to a class of disabled individuals age forty (40) or older.

12. The effect of the practices complained of in paragraph 11 above has been to deprive aggrieved individuals of equal employment opportunities and otherwise adversely affect their status as employees, because of age.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Sheriff's Department, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of age against individuals forty (40) years of age and older.

B. Grant a permanent injunction enjoining Defendant KRS, its officers, successors, assigns and all

persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of age against individuals forty (40) years of age and older.

C. Grant a permanent injunction enjoining Defendant Commonwealth, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of age against individuals forty (40) years of age and older.

D. Order Defendant Commonwealth to enact permanent legislation providing that KRS disability retirement benefits will be granted and calculated without regard to age.

E. Order Defendant Sheriff's Department to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals forty (40) years of age and older, and which eradicate the effects of its past and present unlawful employment practices.

F. Order Defendant KRS to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals forty (40) years of age and older, and which eradicate the effects of its past and present unlawful employment practices.

G. Order Defendant Commonwealth to institute and carry out policies, practices and programs which provide equal employment opportunities for

individuals forty (40) years of age and older, and which eradicate the effects of its past and present unlawful employment practices.

H. Order Defendant Sheriff's Department to make whole Charles Lickteig and the class of individuals whose monetary benefits are being unlawfully withheld as a result of the acts complained of above, by restraining the continued withholding of amounts owing as back benefits with prejudgment interest and recalculated future benefits, in amounts to be determined at trial.

I. Order Defendant KRS to make whole Charles Lickteig and the class of individuals whose monetary benefits are being unlawfully withheld as a result of the acts complained of above, by restraining the continued withholding of amounts owing as back benefits with prejudgment interest and recalculated future benefits, in amounts to be determined at trial.

J. Order Defendant Commonwealth to make whole Charles Lickteig and the class of individuals whose monetary benefits are being unlawfully withheld as a result of the acts complained of above, by restraining the continued withholding of amounts owing as back benefits with prejudgment interest and recalculated future benefits, in amounts to be determined at trial.

K. Order Defendant Sheriff's Department to make whole all individuals adversely affected by the unlawful practices described above, by providing any other affirmative relief necessary to eradicate the effects of its unlawful practices, including but not

limited to reimbursement for purchase of years of service.

L. Order Defendant KRS to make whole all individuals adversely affected by the unlawful practices described above, by providing any other affirmative relief necessary to eradicate the effects of its unlawful practices, including but not limited to reimbursement for purchase of years of service.

M. Order Defendant Sheriff's Commonwealth to make whole all individuals adversely affected by the unlawful practices described above, by providing any other affirmative relief necessary to eradicate the effects of its unlawful practices, including but not limited to reimbursement for purchase of years of service.

N. Grant such further relief as the Court deems necessary and proper in the public interest.

O. Award the Commission its costs of this action.

Respectfully submitted,

C. GREGORY STEWART
General Counsel

/s/
LAURIE A. YOUNG, #11480-49
Regional Attorney

/s/
MICHELLE EISELE, #12070-49
Supervisory Trial Attorney

/s/
NANCY DEAN EDMONDS
Senior Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Indianapolis District Office
101 W. Ohio Street, Suite 1900
Indianapolis, IN 46204
Tel. No. (317) 226-7229
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:99CV500(C)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — PLAINTIFF

v.

JEFFERSON COUNTY SHERIFF'S OFFICE, KENTUCKY RETIREMENT SYSTEMS and THE COMMONWEALTH OF KENTUCKY — DEFENDANTS

AFFIDAVIT OF WILLIAM P. HANES

Affiant, William P. Hanes, upon being duly sworn, states as follows based on his own knowledge and belief:

1. I am the Executive Director of Kentucky Retirement Systems ("Kentucky Retirement") and have in that capacity become familiar with the state retirement plan administered by Kentucky Retirement, the age discrimination claim brought by Charles T. Lickteig before the Equal Employment Opportunity Commission ("EEOC"), and the EEOC's review of such claim.

2. On July 12, 1995 Charles T. Lickteig ("Lickteig") submitted a Notification of Retirement requesting disability retirement from County

Employees' Retirement System which is administered by Kentucky Retirement.

3. At that time, Lickteig was 61 years old and had a total of 17 years 7 months of service (63 months were in a hazardous duty position and 148 months were in non-hazardous duty). Lickteig was thus eligible for unreduced retirement benefits under the provisions of KRS 16.576(1) and KRS 16.505(15) which are made applicable to members of the County Employees' Retirement System engaged in hazardous duty through KRS 78.545(31) and KRS 61.592(4).

4. In accordance with KRS 16.582(2)(b), made applicable to members of the County Employees' Retirement System engaged in hazardous duty through KRS 78.545(40), Lickteig's eligibility for unreduced retirement benefits rendered him ineligible for disability retirement benefits. His application for disability retirement benefits was therefore denied. Lickteig continued to work, but thereafter filed an age discrimination claim with the EEOC, contending that he was unlawfully denied disability retirement benefits because of his age.

5. On June 26, 1996, Lickteig reapplied for retirement benefits, requesting unreduced retirement benefits which were subsequently awarded to him. His last day of employment was June 28, 1996. By this time, Lickteig had 223 months of service; 148 months were in a non-hazardous duty position, 74 months were in hazardous duty, and 1 month was

attributed to accumulated sick leave.[1] Lickteig additionally purchased 22 months of military service,[2] bringing the total years of service upon which his benefits were based to 245 months.

6. The EEOC conducted an extensive investigation of Lickteig's discrimination claim, informally requesting on eight separate occasions that Kentucky Retirement provide a multitude of documents.

7. In addition, the EEOC issued two subpoenas against Kentucky Retirement.

8. Kentucky Retirement fully responded to each informal request for documentation and each subpoena, providing the EEOC with computer discs and a massive volume of hard copy documents.

9. Kentucky Retirement gave the EEOC its complete cooperation over the two-year period during which the EEOC investigation spanned.

10. On August 12, 1998 the EEOC issued a Determination finding "there is reasonable cause to believe that Respondent has violated the ADEA."

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[1] See KRS 78.616. See also KRS 61.546.

[2] See KRS 61.555, applied to the County Employees' Retirement System members through KRS 78.545(6).

11. By way of letter dated September 15, 1998 the EEOC asked if Kentucky Retirement was "interested in conciliation".

12. Since Kentucky Retirement was strongly interested in resolving the matter outside the context of litigation it responded positively to the EEOC's inquiry and met with the EEOC on November 9, 1998.

13. Kentucky Retirement attended the meeting with every intention of working out a joint resolution of the matter. During the conciliation meeting, Kentucky Retirement proposed the promulgation of an administrative regulation as a means of resolving the dispute.

14. The EEOC's representatives who attended the conciliation meeting indicated that this proposal was acceptable to the EEOC.

15. By letter dated November 13, 1998, the EEOC confirmed that the proposed regulation should be provided to it no later than November 23, 1998.

16. Kentucky Retirement complied with that request and submitted to the EEOC a conciliation proposal on November 23, 1998.

17. The EEOC responded to the proposal by letter dated December 3, 1998 which stated in part "The Commission has determined that efforts to conciliate these charges as required by the Age Discrimination in Employment Act of 1967 (ADEA) have been unsuccessful. No further efforts to conciliate this case will be made."

18. Kentucky Retirement was afforded no opportunity to address any factors which the EEOC deemed to be deficiencies in Kentucky Retirement's conciliation proposal. Instead, the EEOC brought suit against Kentucky Retirement charging, in general, that the state retirement plan violates the ADEA.

19. During the EEOC investigation, Kentucky Retirement consulted its actuary, who, based upon his ongoing experience with Kentucky Retirement's plan, advised Kentucky Retirement that the categories created under the state retirement plan were cost justified.

20. After this litigation began, Kentucky Retirement contacted Thomas D. Levy ("Levy") of Segal Company who conducted a formal study of the costs associated with the retirement plan. The formal study confirmed the initial conclusion of Kentucky Retirement's actuary, that the cost of providing benefits under the statutory scheme increased with age. A transcript of Levy's deposition is filed herein in support of the Cross-Motion for Summary Judgment. His report is contained in Exhibit 12 to the deposition.

21. Although I am not now, and have never been a member of the Kentucky General Assembly, and I have not been authorized to speak on behalf of either the current or former members of the Kentucky General Assembly, it is my opinion, after having studied the legislative history of the statutory scheme wherein the state retirement plan is set forth, that the plan is driven by a policy determination that the members of the plan should receive some kind of retirement benefit. The benefits which the members

anticipate receiving are unreduced retirement benefits.[3] A second category of retirement benefits, disability retirement benefits, was created to render assistance to those members who become disabled before becoming eligible for unreduced retirement benefits.

22. It is my understanding that the motivating factor behind establishing this second category of benefits was to provide assistance to members who are unable to continue working, but would not have a source of income through unreduced retirement benefits.

23. It is further my understanding that economic considerations require that the special category of benefits, disability retirement benefits, be limited solely to those who are not otherwise eligible to receive the anticipated benefits, unreduced retirement benefits either via normal retirement or service retirement.

Further, the affiant sayeth not this 27 day of February, 2003.

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[3] There are two routes to receiving unreduced retirement benefits. The first route is based on age and years of service ("normal retirement"), e.g., KRS 16.576 [made applicable to members of the County Employees' Retirement System in hazardous duty through KRS 78.545(31) and KRS 61.592(4)]; the second is based on years of service alone ("service retirement"), e.g., KRS 16.577(2) [made applicable to members of the County Employees' Retirement System in hazardous duty through KRS 78.545(31) and KRS 61.592(4)].

/s/
WILLIAM P. HANES

STATE OF KENTUCKY)
)
COUNTY OF FRANKLIN)

Subscribed, sworn to, and acknowledged before me by William P. Hanes on this the 27th day of February, 2003.

My Commission Expires: 12/14/03

/s/
NOTARY PUBLIC

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 99-500-JBC

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PLAINTIFF,

v.

JEFFERSON COUNTY
SHERIFF'S OFFICE, ET AL., DEFENDANTS.

ORDER

This action is before the court on the parties' cross-motions for summary judgment (Docket Nos. 72 and 100). For the following reasons, the defendant's motion will be granted and the plaintiff's motion will be denied.

Factual Background

Charles Lickteig applied for disability retirement benefits with the County Employees' Retirement System in 1995. His request was denied because he was already eligible for normal retirement. Lickteig continued working until 1996, and then took normal retirement. He sought the aid of the EEOC, which now alleges that the disability retirement policy violates the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., because it discriminates against a class of individuals age forty and over on the basis of age.

Summary Judgment Motions

The plaintiff claims that it is entitled to summary judgment as to liability because the defendants violated the ADEA by paying reduced disability retirement benefits, or denying them altogether, to employees age forty or over. Further, the plaintiff states that the affirmative defenses raised by the defendants are unavailable or not established.

The defendant, Kentucky Retirement Systems, asserts that it is entitled to summary judgment because the plaintiff has failed to make out a *prima facie* case of discrimination or, in the alternative, because their affirmative defenses absolve them of liability. The defendant is also claiming that it is entitled to summary judgment because the EEOC failed to conciliate in good faith. Because the motion will be disposed of on the first ground, it is the only one that will be discussed.

Disability Retirement System

The disability retirement system in dispute is part of an overall retirement plan administered by Kentucky Retirement Systems. There is a single fund from which both normal retirement benefits and disability retirement benefits are paid. KRS § 78.5203. No employee may receive both types of benefits, as that would constitute "double dipping."

Once an employee becomes eligible for normal retirement benefits, that person is no longer eligible for disability retirement, and he will take normal retirement benefits when he retires. *See* KRS

§ 16.582. Eligibility for normal retirement occurs in one of two ways: either when an employee has reached the age of fifty-five and has five years of service, or when an employee has twenty years of service at any age.[1] KRS §§ 16.576, 16.577, 61.595. After an employee has attained either status, he is eligible for normal retirement and, as a consequence, is no longer eligible for disability retirement.

If an employee does receive disability retirement benefits, he may be eligible for service credits, that is, years of service not actually worked but imputed to the employee. Service credits and actual years of service together cannot exceed twenty years. KRS § 16.582. Service credits awarded cannot exceed the number of actual years of service. *Id.* Service credits are calculated beginning with the last date of paid service and continuing through a disabled employee's fifty-fifth birthday. *Id.*

Legal Analysis

The purpose of the ADEA is to prevent people from being deprived of benefits on the basis of inaccurate and stigmatizing stereotypes. *Wexler v. White's Fine Furniture,* 317 F.3d 564, 572 (6th Cir. 2003). If prohibited stereotypes have not played a role in the

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[1] These are the requirements for eligibility for a hazardous worker. There are different requirements for non-hazardous workers. Because the claimant was a hazardous employee, and the same analysis applies for both types of employees, for the sake of clarity and simplicity the elements of hazardous employee retirement eligibility will be referred to in this order.

institution of the disability retirement benefits plan, then the plan is not the result of inaccurate and denigrating generalizations about age, but instead represents an accurate judgment about employees. *See Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993). In order to analyze whether a disability retirement policy is discriminatory, the court uses the *McDonnell Douglas* three-part test. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). First, the plaintiff must establish a *prima facie* case; second, the defendant must offer legitimate, nondiscriminatory reasons for its actions; and third, the plaintiff must then prove that the reasons cited by the defendant are mere pretexts designed to mask age discrimination. *Wexler,* 317 F.3d at 574.

In this disparate treatment claim, the plaintiff must show that the defendants treat some employees less favorably because of their age and that the defendants have discriminatory intent. *See Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995). Liability depends on whether age actually motivates the decision of the party accused of discrimination. *See Hazen Paper Co.,* 507 U.S. 604. Intent may be shown if the disability retirement program is facially discriminatory. *See International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.,* 499 U.S. 187 (1991); *Solon v. Gary Community School Corp.,* 180 F.3d 844 (7th Cir. 1999). The test for facial discrimination in a statute is whether the evidence shows treatment of a person in a manner which but for that person's age would be different. *Johnson Controls, Inc.,* 499 U.S. at 201. Facial discrimination depends on the terms of the

discrimination rather than the motive. In a retirement policy, age is necessarily a factor, as the very nature of such a program requires age considerations. In this disability retirement policy, retirement eligibility is a product of age and years of service. However, finding a retirement policy facially discriminatory merely because age is a factor in the plan is illogical, and the court will not do so now. While discriminatory intent may not be required to show that a statute is facially discriminatory, some indication beyond the fact that a retirement policy uses age and years of service in its retirement eligibility scheme is needed in this case. Without any such indication, the plaintiff is asking the court to hold that age cannot be explicitly referred to in a retirement policy without violating the ADEA, and the court cannot so hold without undermining virtually every retirement policy in existence. Further, finding a retirement policy discriminatory because it calculates retirement eligibility based on age and years of service does nothing to further the purpose of the ADEA, which is to prevent employers from making employment decisions (including provision of benefits) based on denigrating stereotypes about age.

The plaintiff also alleges that the mechanism used to calculate service credits in the disability retirement policy is facially discriminatory because the closer an employee is to reaching normal retirement age (fifty-five) before becoming disabled and seeking disability retirement benefits, the fewer service credits the

employee is eligible to receive.[2] In *Lyon,* "Option B," a portion of an early retirement policy which allowed for years of service to be imputed to an employee retiring early, was attacked as being discriminatory. The court emphasized again and again the importance of proving discriminatory intent in a disparate treatment claim. In that case, the court found that the plaintiff had not made out a *prima facie* case of discrimination because he had shown no evidence of discriminatory intent. The service credits portion of the disability retirement policy in question in this case is similar, and there is no evidence of discriminatory intent presented here. The plaintiff has failed to show how this retirement plan's age elements are discriminatory, either facially or through disparate treatment combined with intent.

Alternatively, the plaintiff states that the defendant violated the ADEA by forcing Lickteig into retirement. *See* 29 U.S.C. § 623(f)(2). In order to analyze a claim of forced retirement, the court must ask whether a reasonable person in the employee's position would feel compelled to resign under the circumstances. *Kalvinskas v. California Institute of Technology,* 96 F.3d 1305, 1308 n. 5 (9th Cir. 1996) *(quoting Bondar v. Synpol,* 843 F.2d 190, 192-3 (5th Cir. 1988)). However, an employee who leaves his employment willingly is precluded from arguing that he was constructively discharged or forced into retirement. *See Lapointe v. United Autoworkers,* 103 F.3d 485 (6th Cir. 1996). A reasonable person in

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[2] As noted above, service credits also decrease as the employee nears twenty years of actual service, because the employee would be eligible for normal retirement at that time.

Licktieg's position would not have felt compelled to retire. The plaintiff was entitled to unreduced retirement benefits, regardless of whether he continued to work. He was no longer entitled to receive disability retirement because he was eligible for normal retirement, and this was the case regardless of whether he resigned. Further, the plaintiff willingly left his employment, and he cannot now claim that he was forced to retire.

The plaintiff argues that he does not have to prove a *prima facie* case of discrimination because he has presented direct evidence of discrimination, in that the statutes describing the disability retirement plan are facially discriminatory. As the court holds that the retirement plan is not facially discriminatory, there is no evidence of discrimination. However, as discussed below, even if the court were to accept that the plaintiff has established a *prima facie* case, or that he was excused from that requirement, he has not proven that the defendant's legitimate reasons for the disputed portions of the retirement plan are mere pretexts designed to mask age discrimination, and so he cannot succeed on his claims.

Assuming that the plaintiff has presented a *prima facie* case, the defendant must offer legitimate, nondiscriminatory reasons for the challenged disability retirement policies. There is one retirement fund which is used for both normal retirement and disability retirement. No employee may "double dip" and receive both types. The option to take disability retirement benefits is just one of the two alternative means of receiving retirement benefits from the common fund open to employees. Disability

retirement is for those employees who become disabled and are forced to retire prematurely. An employee cannot pick and choose which type of benefits to receive because one type is only for those employees who become disabled before they are entitled to receive normal retirement, and not because the disability retirement benefits plan discriminates against older workers.

Service credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled. The credits are an attempt to provide an employee who becomes disabled before normal retirement with benefits similar to those which, had the employee been capable of continuing work through normal retirement, he would have been entitled to receive. The service credit calculation takes age into consideration because the credits are intended only to provide the disabled employee with those benefits that would have been available through normal retirement had the employee not become disabled, not to provide the disabled employee with more benefits than normal retirement would have allowed. Thus, age comes into play in the determination only because age is one of the factors of retirement eligibility.

As the defendant has come forward with valid, nondiscriminatory reasons for the disputed elements of the disability retirement benefits plan, the plaintiff must prove that the reasons stated by the defendant are mere pretext designed to mask discrimination. The plaintiff's only allegations against the defendant were based on the assumption that the disability retirement statutes were facially discriminatory.

Because the court finds that they are not facially discriminatory, the plaintiff's only remaining argument is that the defendant uses the combination of service years and age to comprise the components of eligibility for retirement as a proxy for age. Again, age will always be a factor in retirement plans. The fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a mask used to hide discrimination. Accordingly,

IT IS ORDERED that the plaintiff's motion for summary judgment (DE 72) is **DENIED.**

IT IS FURTHER ORDERED that the defendant's motion for summary judgment (DE 100) is **GRANTED.** The plaintiff's claims are **DISMISSED WITH PREJUDICE.**

As the plaintiff's claims against the other defendants are identical and based upon the same statutory language, and the court has found that there was no violation of the ADEA,

IT IS FURTHER ORDERED that the plaintiff's claims against the Commonwealth of Kentucky and the Jefferson County Sheriff's Office are also **DISMISSED WITH PREJUDICE.**

This the 3rd day of September, 2003.

/s/
JENNIFER B. COFFMAN, JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

JA 33

ENTERED

SEPT 4, 2003

JEFFREY A. APPERSON, CLERK
BY: /s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 99-500-JBC

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PLAINTIFF,

v.

JEFFERSON COUNTY
SHERIFF'S OFFICE, ET AL., DEFENDANTS.

* * * * *

JUDGMENT

The court, having granted summary judgment in favor of the defendant, Kentucky Retirement Systems, and having dismissed the plaintiff's claims with prejudice, enters judgment in favor of the defendants.

This is a **FINAL** and **APPEALABLE** order, and no just cause for delay exists.

This matter is **STRICKEN** from the court's active docket.

This the 3rd day of September, 2003.

/s/
JENNIFER B. COFFMAN, JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

JA 35

ENTERED

SEPT 4, 2003

JEFFREY A. APPERSON, CLERK
BY: /s/_____
DEPUTY CLERK

RECOMMENDED FOR FULL-TEXT
PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0397p.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v. No. 03-6437

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, and COMMONWEALTH OF KENTUCKY,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 99-00500—Jennifer B. Coffman, District Judge.

Argued: July 28, 2005

Decided and Filed: September 19, 2005

Before: ROGERS and SUTTON, Circuit Judges; ROSEN, District Judge.*

COUNSEL

ARGUED: Eric S. Dreiband, OFFICE OF GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Robert D. Klausner, KLAUSNER & KAUFMAN, Plantation, Florida, for Appellees. **ON BRIEF**: Eric S. Dreiband, Dori K. Bernstein, OFFICE OF GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Robert D. Klausner, KLAUSNER & KAUFMAN, Plantation, Florida, Mitchell L. Perry, JEFFERSON COUNTY ATTORNEY'S OFFICE, Louisville, Kentucky, James D. Allen, C. Joseph Beavin, Lizbeth A. Tully, STOLL, KEENON & PARK, Lexington, Kentucky, D. Brent Irvin, OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellees.

OPINION

ROGERS, Circuit Judge. Plaintiff Equal Employment Opportunity Commission ("EEOC") appeals the district court's dismissal of its case on defendants' motion for summary judgment. The suit

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

is a public enforcement action under the Age Discrimination in Employment Act ("ADEA") against defendants the Kentucky Retirement System, the Jefferson County Sheriff's Office, and the Commonwealth of Kentucky (collectively "Kentucky Retirement"). The EEOC alleges that the defendants operate an employee benefit plan that pays less disability retirement benefits to older employees because of their age in a manner that violates the ADEA. Under our court's holding in *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), the Kentucky Retirement System plan does not appear to violate the ADEA. The use of age in the Kentucky Retirement System plan is indistinguishable from the use of age in the early retirement plan at issue in *Lyon,* which was held not to violate the ADEA. The judgment of the district court is therefore affirmed.

I.

At issue is the retirement plan for certain state and county employees administered by the Kentucky Retirement System. An employee's eligibility is determined by statute. There are three separate systems in the overall retirement plan: the County Employees' Retirement System, the Kentucky Employees Retirement System, and the State Police Retirement System. Ky. Rev. Stat. §§ 16.150, 61.515, 78.520. Members in each system are classified as occupying "hazardous position[s]" or nonhazardous positions. Ky. Rev. Stat. § 61.592. An employee in a hazardous position is eligible to receive normal retirement benefits at age 55, or with twenty years of service, Ky. Rev. Stat. §§ 16.576, 16.577(2), 61.592(4),

78.545(31), whereas an employee in a nonhazardous position is eligible to receive normal retirement benefits at age 65. Ky. Rev. Stat. § 61.510(18). The EEOC does not challenge the way in which the plan provides for normal retirement under either system.

For purposes of clarity, Kentucky Retirement and the district court below discussed the application of the retirement plan only to hazardous position employees, as the EEOC's claimant was last employed in a hazardous position. We adopt this practice also.

This case involves the additional provision, under the plan, of *disability* retirement benefits, available to employees who become disabled before they are eligible for normal retirement benefits.[1] The scheme appears to disadvantage older workers by virtue of the fact that a class of workers, determined in significant part by age (actually youth), gets unworked years

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[1] Two separate versions of the governing statute are at issue. Prior to July 2000, an employee was not eligible to receive disability retirement benefits unless he was "less than normal retirement age." Ky. Rev. Stat. § 16.582(2)(b) (1999), Ky. Rev. Stat. § 61.600(1)(b) (1999). After this litigation began, the provisions were amended, and currently provide that an employee is not eligible for retirement disability benefits if the employee is "eligible for an unreduced retirement allowance." Ky. Rev. Stat. § 16.582(2)(b) (2001) (effective July 14, 2000); *see* 2000 Ky. Acts 385, at *4. Under both versions, an employee who is 55 or older cannot receive disability retirement benefits. In addition, under the current version, an employee who became eligible to receive normal retirement benefits by virtue of having 20 years of service also could not receive disability retirement benefits.

attributed to them for purposes of calculating the amount of disability retirement. When workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits. The amount of the yearly benefits is generally calculated as 2.5% of the employee's final compensation times the number of years worked. However, for employees who are not yet eligible for normal retirement (i.e., employees under age 55 and with fewer than 20 years of service), additional years are added to the number of years worked for purposes of the calculation. The number of years added is the number of years remaining until the worker *would have* reached either normal retirement age or twenty years of service, but no more than the number of years already worked.[2] The purpose

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[2] The statute provides:

> The disability retirement allowance shall be determined as provided in KRS 16.576, except if the member's total service credit on his last day of paid employment in a regular full-time position is less than twenty (20) years, service shall be added beginning with his last date of paid employment and continuing to his fifty-fifth birthday. The maximum service credit added shall not exceed the total service the member had on his last day of paid employment, and the maximum service credit for calculating his retirement allowance, including his total service and service added under this section, shall not exceed twenty (20) years.

Ky. Rev. Stat. § 16.582(5)(a) (Supp. 2004).

appears to be to give a disabled worker the amount of benefit he would have been entitled to had he worked until normal retirement, notwithstanding the fact that he had not actually worked those additional years.

Under this scheme, disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less

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For instance, an employee who becomes disabled at age 45 with 10 years of service will be entitled to have his benefits calculated on the basis of 20 years of service, whereas an employee who becomes disabled at age 45 with 7 years of service will be entitled to have his benefits calculated on the basis of 14 years of service.

This text is from a version effective July 13, 2004, which varies only slightly from the prior version. Although the 2004 changes to subsection 5(a) were only cosmetic, an entirely new scheme of calculating disability retirement benefits was added as subsection 5(b) for employees "whose participation begins on or after August 1, 2004."

> For a member whose participation begins on or after August 1, 2004, the disability retirement allowance shall be the higher of twenty-five percent (25%) of the member's monthly final rate of pay or the retirement allowance determined in the same manner as for retirement at his normal retirement date with years of service and final compensation being determined as of the date of his disability.

Ky. Rev. Stat. § 16.582(5)(b) (Supp. 2004). The revised version is not at issue here.

than twenty years of service) and the same final compensation. The employee who receives normal retirement benefits will be entitled to 2.5% of his final compensation times his actual service years, whereas the employee who will receive disability retirement benefits will receive the same 2.5% of his final compensation, but will have it multiplied by a number that is higher than his actual years of service, leading to a higher benefit. Moreover, disability benefits will be greater for workers who become entitled to disability retirement at a younger age with the same number of years of service.

A chart prepared by the EEOC shows these discrepancies clearly.

Kentucky Retirement System Benefit to Hazardous Employee Disabled from Working

Age at Disability	*Final Pay*	*# Years Service*	*Multiplier*	*Annual Benefits*	*Monthly Payment*
55 or older	$50,000	10	10	$12,500	$1,041.66
53	$50,000	10	12	$15,000	$1,250.00
50	$50,000	10	15	$18,750	$1,562.50
48	$50,000	10	17	$21,250	$1,770.83
45 or younger	$50,000	10	20	$25,000	$2,083.33

This particular dispute between the EEOC and Kentucky Retirement arose out of an EEOC claim filed by Charles Lickteig, formerly a Deputy Sheriff for Jefferson County. In 1995, Lickteig, who was then 61 years old and had 17 years of service, applied for

disability retirement benefits from the County Employees' Retirement System. Lickteig was denied disability retirement benefits; the letter informing him of the decision stated that he was ineligible "since you are over age 55." In February 1996, Lickteig filed a charge with the EEOC. The EEOC conducted an investigation over the next two years, ultimately determining that the Kentucky Retirement System violated the ADEA. The EEOC, as required, attempted conciliation, but was not satisfied with Kentucky Retirement's proposed changes. On August 2, 1999, the EEOC filed suit in United States District Court for the Western District of Kentucky, alleging a violation of the ADEA. The defendants filed motions to dismiss, claiming immunity under the Tenth and Eleventh Amendments. The district court denied the motions, and the defendants sought interlocutory appeal to this court. A panel of this court held that the defendants were not entitled to immunity, with one exception. *EEOC v. Kentucky Retirement Systems,* Nos. 005664, 00-6366, 006367, 16 Fed. App'x 443, 453 (6th Cir. Aug. 2, 2001).[3]

On remand, both sides moved for summary judgment. The district court compared the Kentucky Retirement System plan to the early retirement plan in *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), and held that the EEOC "has failed to show how this

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[3] This court held that Kentucky was entitled to immunity under the Tenth Amendment with respect to the EEOC's attempt to seek a mandate that Kentucky enact permanent legislation. 16 Fed. App'x at 453.

retirement plan's age elements are discriminatory, either facially or through disparate treatment combined with intent." The EEOC filed a timely appeal.

II.

Affirmance is required because this case is not materially distinguishable from *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), in which we upheld an early retirement plan that attributed unworked years to younger workers in order to calculate benefits. At issue in *Lyon* was a retirement plan for employees of the Ohio Education Association ("OEA") that included an early retirement provision, called "Option B." Normal retirement was available to employees who had reached age 62 or had 32 years of service. 53 F.3d at 136. Early retirement was available to employees who had reached age 60 (with 5 years of service) or had 20 years of service. *Id.* Normal retirement benefits were calculated much as they are under the Kentucky Retirement System plan—an employee's years of service were multiplied by a fixed percentage of the employee's "average monthly compensation." *Id.* Early retirement benefits under Option B were also calculated much as disability retirement benefits are calculated under the Kentucky Retirement System plan—additional years of service were added to actual years of service so that it was as if the employee had worked until age 62. *Id.* For example, an employee who retired at age 56 with 21 years of service would receive credit for 27 years. *Id.* at 137. Just as in the Kentucky Retirement System plan, therefore, as between an older employee who retires under the

normal retirement plan, and a younger employee who retires under early retirement plan with the identical years of actual service and the same average monthly compensation, the older employee will receive less retirement benefits than the younger person. This court ultimately concluded "that plaintiffs have failed to advance a *prima facie* case of disparate-treatment or disparate-impact discrimination" and upheld the plan. *Id.*

This court in *Lyon* first explained the difference between disparate treatment and disparate impact.

> "'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory."

Id. at 138 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977) (citations omitted)). This court next turned to the most on-point

Supreme Court decision, *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993). *See Lyon,* 53 F.3d at 138. The plaintiff in that case, Biggins, had been fired at age 62, several weeks before his pension benefits would have vested. 507 U.S. at 607. The Supreme Court was thus faced with the issue of "whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age." *Id.* at 608. The Court, in holding that there was no discrimination, noted that "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Id.* at 610. Accordingly, "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.*

The *Lyon* court concluded that, under the reasoning of *Hazen Paper,* "the ADEA protects workers only from an employer who intended discrimination *because of* age." *Lyon,* 53 F. 3d at 138.

> "[T]he very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with age. [...] Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."

Lyon, 53 F.3d at 138 *(quoting Hazen Paper Co.,* 507 U.S. at 610 (citation omitted)). The *Lyon* court

reasoned that the plaintiffs challenging Option B had not met the burden of showing intentional discrimination because of age.

> Plaintiffs have offered no facts that even hint at an improper motive in drafting or executing Option B by OEA or PSU. There was no evidence that either defendant intended Option B to discriminate against older employees. Nor have plaintiffs alleged that OEA or PSU was aware of a disparate effect on older employees, such that we could infer intent from knowledge. Plaintiffs state . . . in paragraphs ten and eleven of their complaint:
>
> > [Y]ounger employees who take an early retirement receive a greater pension amount than do older employees who retire with the same length of service.
> >
> > The effect of the practices complained of above . . . has been to deprive Plaintiff[s] . . . of equal employment opportunities and otherwise adversely affect their status as employees because of age, forty (40) or over.
>
> Complaint at 4. The absence of any reference to actions by OEA or PSU is telling.

Lyon, 53 F.3d at 139.

This court next rejected what it characterized as the plaintiffs' efforts "to cure their lack of evidence of *intent* by inferring discriminatory animus on the basis of the disparate *effect* on older workers." *Id.* First, the

court noted that if a plaintiff were permitted to use disparate effect to prove intent, the distinction between the disparate treatment and disparate impact theories of discrimination would be meaningless. *Id.* at 139-40. Second, this court in *Lyon* concluded that in fact Plan B did not have the effect of disadvantaging older workers *because of* age.

> Clearly, an employee who began work when older will have less time to accumulate years of service, and therefore will receive a lower benefit upon reaching 62, other things being equal; this is true under either early or normal retirement. . . . [T]he disparity that plaintiffs find objectionable is a product of their length of service and their age when originally hired by OEA. Thus, any disparity merely reflects the actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age of 62. . . .

Id. at 140. Ultimately, therefore, this court in *Lyon* concluded that the plaintiffs had failed to demonstrate a *prima facie* case of age discrimination, and affirmed the dismissal of their case. *Id.* at 140-41.

Because the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA. Under both plans, certain younger employees (those below the standard retirement age) are eligible to receive credit for additional years of service that they did not in fact work, with the result that a younger employee receives

greater retirement benefits than an older employee with the identical final or average salary and years of actual service. Although this case involves disability retirement benefits and *Lyon* involved early retirement benefits, that difference is not material.[4] Under *Lyon*, therefore, the EEOC has failed to demonstrate discriminatory intent, and Kentucky Retirement was entitled to summary judgment.

It is arguable that the application of the ADEA to benefit plans should be distinguished from the application of the ADEA to individual firings of the type at issue in *Hazen Paper*. Intent arguably should be inferred from the employer's knowledge concerning its own plan. Such an argument is, however, foreclosed by *Lyon*. The OEA retirement plan in *Lyon* explicitly used age to calculate benefits. Employees who retired before reaching age 62 received credit for the years remaining before age 62. Employees over age 62 were not entitled to credit years. Accordingly, there was disparate treatment because of age. This court commented in *Lyon* that "the absence of any reference to action *by* OEA or PSU is telling," 53 F.3d at 139, even though the only action that will ever be taken in cases involving retirement plans—as opposed to individual adverse actions—is the action of writing the policy.

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[4] Although a statutory exemption to the ADEA addresses early retirement incentive plans, *Lyon* explicitly declined to consider whether the exemption applied in that case. 53 F.3d at 137. At oral argument the EEOC repeatedly declined to argue that the *Lyon* result could be considered warranted by the statutory exception for early retirement incentive plans.

This court in *Lyon* could also perhaps be criticized for its reliance on the observation that "the very purpose of offering an early retirement *incentive* plan is to 'buy out' expensive workers." *Id.* Under a disparate treatment analysis, the presence of a justification for age discrimination does not, *ipso facto,* make that type of discrimination not actionable. Indeed, Congress's intent in enacting the Older Workers Benefit Protection Act ("OWBPA"), which amended the ADEA, appears to have been to make schemes such as the Kentucky Retirement System plan unlawful unless cost-justified. For instance, during the final debate on the Act, Rep. Roukema remarked as follows:

> The purpose of this legislation is to ensure that older workers do not receive less benefits than younger workers. . . . [T]he bill provides that workers who are on disability cannot be forced to receive only their pension at retirement age. Under this bill, they will receive the difference between what is typically a lower pension benefit and the higher disability benefit. The end result is that older workers will not find themselves penalized by virtue of their age and pension eligibility when it comes to receiving benefits.

136 Cong. Rec. H8614-02. Furthermore, the OWBPA was passed to overrule *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158 (1989), which involved a retirement plan similar in many respects to the Kentucky Retirement System plan. The Public Employees Retirement System of Ohio ("PERS") provided both normal retirement benefits and

disability retirement benefits, and, as is true for the Kentucky Retirement System plan, an employee who had reached retirement age was ineligible for disability benefits. 492 U.S. at 162. The PERS system employed a different method of calculating benefits, but with a similar result: disability benefits were guaranteed to be no less than 30% of the disabled employee's final salary, whereas regular retirement benefits were not guaranteed. *Id.* at 163. In the case of the plaintiff Betts, who became disabled at age 61, one year after the 60-year retirement age, disability benefits would have been approximately double the amount of normal retirement benefits. *Id.* The Supreme Court did recognize that the PERS plan was facially discriminatory because it "renders covered employees ineligible for disability retirement once they have attained age 60," *id.* at 166, but concluded that an exception applied. The exception, section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2) (1988), provided that notwithstanding the general prohibition on the use of age to determine benefits, it was not unlawful for an employer

> to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual.

29 U.S.C. § 623(f)(2) (1988); *see Betts*, 492 U.S. at 165-66. The remainder of the case was devoted to establishing the definition of "subterfuge," with the Court ultimately concluding that under the subterfuge provision, "the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation." *Id.* at 181. In short, the PERS plan would not be held to violate the ADEA, despite the fact that it based benefits on age, unless the plaintiff proved subterfuge.

Congress did not agree with the Supreme Court's interpretation of the ADEA, and accordingly, enacted the OWPBA to overrule *Betts*.

> The Congress finds that, as a result of the decision of the Supreme Court in *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.

Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621). Congress thought that the plan in *Betts* violated the ADEA, unless it was cost-justified as provided for in a new, codified exception. The cost-justified exception is

not now at issue in this case—Kentucky Retirement has argued that its plan is cost-justified, but the district court declined to address the defense. The plan at issue in *Betts* rendered employees who had reached age 60 ineligible to receive disability benefits. The plan in this case, under the pre-2000 version, made employees who had reached age 55 ineligible to receive disability benefits. The post-2000 version is only one step removed from being in relevant respects identical: it limits the scope of the age discriminatory scheme to the pool of workers who have fewer than 20 years of service. If Congress thought that the plan in *Betts* violated the ADEA, then it could be argued that Congress would think that the Kentucky Retirement Systems plan violates the ADEA. The legislative history of the OWPBA was, however, available at the time that *Lyon* was decided, and therefore does not distinguish this case from *Lyon*.

Although the difficulties with the *Lyon* rationale and holding might warrant a different result in this case were the *Lyon* case not controlling in this circuit, such a different result would also have its troubling aspects. In *Lyon* the court identified an acceptable employer policy of paying more to buy out employees who were likely to stay on longer and thus cost the company more to keep on. If such a policy is acceptable under the ADEA, it follows that a policy of insuring against the employee's involuntary loss of such value is also acceptable. Assuming that each worker desires to accumulate a working-life's worth of retirement benefits, an employer might reasonably want to provide employees with assurance that such a "working life's worth" will be accumulated, against the risk that the employee will become disabled during his

or her period of employment. At oral argument, EEOC counsel was unable to articulate how, absent a scheme like Kentucky's, such a benefit could be provided without violating the ADEA.

III.

Because the use of age in the Kentucky Retirement System plan is indistinguishable from the use of age in the early retirement plan at issue in *Lyon*, the Kentucky Retirement System plan does not violate the ADEA. The judgment of the district court granting summary judgment in favor of Kentucky Retirement is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-6437

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, — Plaintiff - Appellant

v.

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, and COMMONWEALTH OF KENTUCKY. — Defendants - Appellees

Before: ROGERS and SUTTON, Circuit Judges; ROSEN, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206
File Name: 06a0405p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v. No. 03-6437

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, and the COMMONWEALTH OF KENTUCKY,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 99-00500—Jennifer B. Coffman, District Judge.

Argued: June 7, 2006

Decided and Filed: October 31, 2006

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN,
Circuit Judges.

COUNSEL

ARGUED: Dori K. Bernstein, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Robert D. Klausner, KLAUSNER & KAUFMAN, Plantation, Florida, for Appellees. ON BRIEF: Dori K. Bernstein, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Robert D. Klausner, KLAUSNER & KAUFMAN, Plantation, Florida, Mitchell L. Perry, JEFFERSON COUNTY ATTORNEY'S OFFICE, Louisville, Kentucky, Lizbeth A. Tully, C. Joseph Beavin, James D. Allen, STOLL KEENON OGDEN, Lexington, Kentucky, D. Brent Irvin, OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellees.

MOORE, J., delivered the opinion of the court, in which MARTIN, DAUGHTREY, COLE, CLAY, GIBBONS, SUTTON, COOK, and GRIFFIN, JJ., joined. ROGERS, J. (p. 12), delivered a separate opinion concurring in the result. BOGGS, C. J. (pp. 13-18), delivered a separate dissenting opinion, in which BATCHELDER, GILMAN, and McKEAGUE, JJ., joined.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant the Equal Employment

Opportunity Commission ("EEOC") brings this public-enforcement age-discrimination lawsuit against Defendants-Appellees the Jefferson County Sheriff's Department, the Kentucky Retirement Systems, and the Commonwealth of Kentucky (referred to collectively as "KRS"), alleging that KRS's disability-retirement-benefits plan for state and county employees violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, as amended by the Older Workers Benefit Protection Act ("OWBPA"), Pub. Law 101-433, 104 Stat. 978 (1990). The KRS disability-retirement-benefits plan (hereinafter "The KRS plan") disqualifies employees who are still working from receiving disability-retirement benefits if they have already reached normal retirement-benefit age at the time they become disabled. The KRS plan also calculates disability retirement benefits in such a way that an older employee who is eligible to receive disability benefits receives fewer benefits — in the form of lower monthly benefit payments — than a younger disabled employee receiving disability-retirement benefits who is similar to the older disabled employee in every relevant factor other than age.

Both the district court and the original panel of this court concluded that pursuant to *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), the EEOC had failed to establish a prima facie violation of the ADEA. *Lyon* concluded that a retirement plan that used age as a factor to determine benefits in a materially indistinguishable manner to the way that age is used in the KRS plan did not establish a prima facie violation of the ADEA despite the fact that older

workers received lower benefits because of their age. *Lyon* held that in addition to demonstrating disparate treatment on the basis of age, a plaintiff needed to produce evidence of discriminatory animus against older people in order to survive the employer's summary-judgment motion.

After reviewing the parties' arguments and the relevant law, we conclude that the EEOC has established a prima facie violation of the ADEA, because the KRS plan is facially discriminatory on the basis of age. Supreme Court authority on disparate-treatment-discrimination claims as well as the persuasive authority of many of the other circuits and the history of the ADEA (as amended by the OWBPA) demonstrate that KRS is not entitled to summary judgment. We further hold that when an employment policy or benefit plan such as the KRS plan is facially discriminatory, a plaintiff challenging that policy does not need additional proof of discriminatory animus in order to establish a prima facie disparate-treatment claim. Upon en banc review, we conclude that *Lyon's* standard for a disparate-treatment age-discrimination claim is inconsistent with Supreme Court authority as well as the rulings of several of our sister circuits in cases involving the similar role of age in employee-benefit plans. We therefore overrule in part our previous decision in *Lyon*.

Because we conclude that the EEOC has established a prima facie claim of age discrimination, we **REVERSE** the district court's grant of summary judgment to KRS on the EEOC's age-discrimination claim and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

The dispute that led to this lawsuit began when Charles Lickteig, who was at the time a Deputy Sheriff with the Jefferson County Sheriff's Department, was denied disability-retirement benefits under the KRS plan because of his age. Because Lickteig's job as a Deputy Sheriff was considered hazardous, Lickteig became eligible for normal retirement benefits at age 55,[1] but he chose to continue working past that date because he had school-age children to support. Joint Appendix ("J.A.") at 49 (Lickteig Aff. ¶ 11). In 1995, Lickteig, who had worked as a Deputy Sheriff since 1978, became disabled due to "a deteriorating vertebra[], arthritis, nerve damage, and Parkinson's disease" to the point that he could no longer perform his Deputy Sheriff duties. J.A. at 48 (Lickteig Aff. ¶¶ 4, 6). In July 1995, at age sixty-one and with seventeen years and seven months worth of service, Lickteig applied for disability-retirement benefits under the KRS plan. J.A. at 42 (William Hanes Aff. ¶ 3); J.A. at 49 (Lickteig Aff. ¶ 7). In a letter dated August 25, 1995, defendants notified Lickteig that his request for disability-retirement benefits had been

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[1] As the original panel of this court explained, under the KRS retirement system, "[a]n employee in a hazardous position is eligible to receive normal retirement benefits at age 55, or with twenty years of service, Ky. Rev. Stat. §§ 16.576, 16.577(2), 61.592(4), 78.545(31), whereas an employee in a nonhazardous position is eligible to receive normal retirement benefits at age 65. Ky. Rev. Stat. § 61.510(18)." *EEOC v. Jefferson County Sheriff's Dep't*, 424 F.3d 467, 469 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006).

denied because of his age. In its denial letter, KRS explained:

> Our laws state that you must have at least 60 months of service credit, be under age 55, and apply within 12 months of your last day of paid employment in a regular full-time position to qualify for Disability Retirement. Therefore, you are not eligible to apply for Disability Retirement since you are over age 55 and in a hazardous position.

J.A. at 51 (Lickteig Denial Letter). As a result of the denial of his request for disability-retirement benefits, Lickteig filed a charge of discrimination with the EEOC in February 1996, alleging that defendants illegally denied him the benefits because of his age. J.A. at 57-59 (EEOC Charges). The EEOC began investigating Lickteig's charges and eventually concluded that the KRS plan violated the ADEA.

The material aspects of the KRS plan are as follows. First, the KRS plan provides two types of retirement benefits — normal retirement benefits and disability-retirement benefits. Employees like Lickteig who work in hazardous positions are eligible for normal retirement benefits at age fifty-five or after completing twenty years of service, whereas an employee working in a nonhazardous position is eligible for normal retirement benefits at age sixty-five. The EEOC is not challenging the KRS plan provisions for normal retirement benefits for either class of employees, but rather only the plan's provision of disability-retirement benefits. As Lickteig is a hazardous-category employee, the district court and

the original hearing panel of our court analyzed only the disability-retirement plan's impact upon employees in hazardous positions, and we do the same. We note, however, that our holding is equally applicable to KRS's treatment of employees in nonhazardous positions to the extent that the disability-retirement plan utilizes age in a materially indistinguishable way in the provision of disability-retirement benefits to employees in nonhazardous positions.

The EEOC argues that the KRS plan's provisions of disability-retirement benefits violates the ADEA because the plan "denies benefits or pays reduced benefits, because of age." J.A. at 21 (Compl. at 1). As the original hearing panel of our court explained:

> The [KRS disability-retirement benefits] scheme appears to disadvantage older workers by virtue of the fact that a class of workers, determined in significant part by age (actually youth), gets unworked years attributed to them for purposes of calculating the amount of disability retirement. When workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits. The amount of the yearly benefits is generally calculated as 2.5% of the employee's final compensation times the number of years worked. However, for employees who are not yet eligible for normal retirement (i.e., employees under age 55 and with fewer than 20 years of service), additional years are added to the number of years worked for purposes of the calculation [of disability-retirement benefits]. The number of years added is the number of

> years remaining until the worker *would have* reached either normal retirement age or twenty years of service, but no more than the number of years already worked. The purpose appears to be to give a disabled worker the amount of benefit he would have been entitled to had he worked until normal retirement, notwithstanding the fact that he had not actually worked those additional years.
>
> Under this scheme, disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less than twenty years of service) and the same final compensation. The employee who receives normal retirement benefits will be entitled to 2.5% of his final compensation times his actual service years, whereas the employee who will receive disability retirement benefits will receive the same 2.5% of his final compensation, but will have it multiplied by a number that is higher than his actual years of service, leading to a higher benefit. Moreover, disability benefits will be greater for workers who become entitled to disability retirement at a younger age with the same number of years of service.

EEOC v. Jefferson County Sheriff's Dep't, 424 F.3d 467, 469-70 (6th Cir. 2005) (footnotes omitted), *vacated on grant of reh'g en banc* (2006).

In addition, a hazardous-category employee eligible for the disability-retirement-benefit plan who is injured in the line of duty is guaranteed monthly

benefits of at least 25% of monthly final rate of pay, and if the employee has dependent children, she receives a dependent-child benefit of 10% of monthly final rate of pay for each child, up to a maximum for all dependent children of 40% of monthly final rate of pay. KY. REV. STAT. ANN. § 16.582(6). The parties do not dispute that an otherwise-identical employee who becomes disabled in the line of duty but because of her age at the time of disability is ineligible for disability-retirement benefits could not receive these additional dependent benefits.

The EEOC has provided charts demonstrating the impact of an employee's age on her disability-retirement-benefit amount in its brief. EEOC Br. at 14, 16. These charts illustrate, and defendants do not dispute, that:

> assuming every factor, other than age, that is relevant to determine an employee's benefits *(i.e.,* type of position, disabling condition, final compensation, and length of service) is identical, the amount paid annually to a worker who retires on disability at a younger age will frequently exceed (and will never be less than) the annual benefits of a worker who retires due to disability at an older age.

EEOC Br. at 16-17. Additionally, the EEOC argues, and defendants do not dispute, that:

> In every case, a worker younger than normal retirement age (55/65) who retires on disability will receive more benefits each year than an older employee who retires from the same job,

> with the same disabling condition, length of service, and final compensation, who becomes disabled after reaching 55/65 and must take normal retirement.

EEOC Br. at 16.

The EEOC challenges both the 1998 and the 2000 versions of the Kentucky statute governing the KRS plan.[2] *See* EEOC Br. at 7-8 (explaining challenged aspects of both the pre-2000 and 2000 versions of the KRS plan); *id.* at A-2 (excerpting portions of the pre-2000 and 2000 versions of the statute). The original panel explained the key differences between the 1998 and 2000 versions of the statute:

> Prior to July 2000, an employee was not eligible to receive disability retirement benefits unless he was "less than normal retirement age." Ky.Rev.Stat. § 16.582(2)(b)(1999), Ky.Rev.Stat. § 61.600(1)(b)(1999). After this litigation began,

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[2] We will therefore confine our analysis to the 1998 and 2000 versions of the statute. We note, however, that the Kentucky Legislature again revised the KRS plan in 2004. The 2004 revision retained the age-based eligibility requirements of the 2000 version, but altered the calculation of disability-retirement benefits. For members beginning to participate on or after August 1, 2004, disability-retirement pay is calculated to be "the higher of twenty-five percent (25%) of the member's monthly final rate of pay or the retirement allowance determined in the same manner as for retirement at his normal retirement date with years of service and final compensation being determined as of the date of his disability." KY. REV. STAT. ANN. § 16.582(5)(b).

> the provisions were amended, and currently provide that an employee is not eligible for retirement disability benefits if the employee is "eligible for an unreduced retirement allowance." Ky.Rev.Stat. § 16.582(2)(b) (2001) (effective July 14, 2000); *see* 2000 Ky. Acts 385, at *4. Under both versions, an employee who is 55 or older cannot receive disability retirement benefits. In addition, under the current version, an employee who became eligible to receive normal retirement benefits by virtue of having 20 years of service also could not receive disability retirement benefits.

EEOC v. Jefferson County, 424 F.3d at 469 n. 1. The EEOC explains that it is not challenging the exclusion of this latter group of employees — those rendered ineligible for disability-retirement benefits because of their years of service, rather than their age. The EEOC only "seeks relief for individuals who, because of age, were excluded from disability retirement, or applied for disability retirement and have received fewer annual benefits, since October 16, 1992," which is the enactment date of the OWBPA. EEOC Reply Br. at 27; *see also* EEOC Br. at 34.

In the fall of 1998, the EEOC and KRS attempted to conciliate this dispute, but the parties could not reach an agreement. J.A. at 60-62 (Marcia Hall-Craig Aff.). On August 2, 1999, the EEOC filed this lawsuit in the United States District Court for the Western District of Kentucky, alleging that the KRS plan illegally discriminates on the basis of age in violation of the ADEA. J.A. at 21-23 (Compl. ¶¶ 1-12). KRS filed a motion to dismiss the suit on Tenth and

Eleventh Amendment immunity grounds. After the district court denied defendants' motion to dismiss, a panel of our court affirmed that decision, holding that, with one exception, the Tenth and Eleventh Amendments do not shield KRS from the EEOC's age-discrimination suit. *EEOC v. Ky. Ret. Sys.*, 16 F. App'x 443, 453 (6th Cir. 2001). After the case was remanded to the district court, both the EEOC and KRS moved for summary judgment. The district court granted summary judgment for defendants, concluding that pursuant to our reasoning in *Lyon*, discriminatory intent was necessary to establish a prima facie case of age discrimination in a disparate-treatment claim. J.A. at 32-33 (Dist. Ct. Op. at 4-5). The district court recognized that intent could be inferred from a facially discriminatory policy, but found that the KRS plan was not facially discriminatory, and thus concluded that the EEOC had not alleged a valid disparate-treatment ADEA claim. The EEOC filed a timely notice of appeal.

Although suggesting concerns regarding the soundness of *Lyon's* reasoning, the original hearing panel of our court deemed itself bound by the *Lyon* decision and affirmed, holding that "[b]ecause the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan [held to be consistent with the ADEA] in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA." *EEOC v. Jefferson County*, 121 F.3d at 473. The EEOC petitioned for rehearing en banc, arguing that the KRS plan is facially discriminatory, and that the Commission has therefore established a prima facie claim of age discrimination. The EEOC also urges us to overrule *Lyon* to the extent

that *Lyon* holds that a plaintiff challenging a facially discriminatory employment policy must have proof that the policy was motivated by discriminatory animus against older workers in order to state a prima facie violation of the ADEA.

II. ANALYSIS

We begin with a discussion of the origins of the ADEA, as the history of the Act informs our analysis of the issues raised in this case. Congress considered including age as a protected class when it was debating and drafting Title VII of the Civil Rights Act of 1964, but declined to do so because of concerns that employers might sometimes have a legitimate basis for making age-related employment decisions. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587-88 (2004). In order to determine whether Congressional action to address age discrimination was necessary and to understand better what type of legislation might remedy the existing problems, Congress requested that then-Secretary of Labor Willard Wirtz conduct "a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005) (quoting Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964)).

The Secretary of Labor's report, submitted to Congress in June 1965, concluded that age discrimination was sufficiently widespread that it warranted public concern, but that the nature of age discrimination was quite different from discrimination

based upon the classes protected by Title VII. U.S. SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5-6 (June 1965), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 22-23 (1981) (hereinafter "Wirtz Report"). "Because the ADEA was modeled on the Wirtz Report's findings and recommendations, the Report provides critical insights into the statute's meaning." *Smith,* 544 U.S. at 254 (O'Connor, J., concurring in the judgment). The Wirtz Report concluded "that there was little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits." *Id.* at 232 (majority opinion). The Report stated that it had "found no evidence of prejudice based on dislike or intolerance of the older worker," and that "intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers." Wirtz Report at 6. Despite finding a lack of discriminatory animus against older people, Secretary Wirtz found "substantial evidence of arbitrary" age discrimination. *Id.* at 5. Secretary Wirtz defined arbitrary[3] age discrimination as

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[3] The Supreme Court has largely adopted the Wirtz Report's definition of "arbitrary" age discrimination in its ADEA jurisprudence. In *General Dynamics Land Systems, Inc. v. Cline,* the Court stated that the ADEA's terms "arbitrary limits" and "arbitrary age discrimination" "are unmistakable references to the Wirtz Report's finding" that age ceilings in hiring were at the time widespread. 540 U.S. at 590. "The ADEA's ban on 'arbitrary

"assumptions about the effect of age on [an employee's] ability to do a job *when there is in fact no basis for these assumptions.*" *Id.* at 2. The Report explains that a common form of arbitrary age discrimination at that time was the refusal of employers to hire individuals for positions once they had reached a certain age, without any actual relevance to the particular position's job requirements. *Id.* at 6-8.

The Wirtz Report inspired Congress to request that the Secretary draft proposed legislation to combat age discrimination, and after that was completed, Congress "acted favorably on his proposal" and enacted the ADEA. *Smith,* 544 U.S. at 232-33. In 1967, Congress enacted the ADEA, which now renders it "unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;" as well as "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(1)-(2).

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limits' thus applies to age caps that exclude older applicants, necessarily to the advantage of younger ones." *Id.* Similarly, in her concurrence in *Smith v. City of Jackson,* Justice O'Connor read the Wirtz Report's definition of "arbitrary" as "clearly equat[ing] with disparate treatment" and as treatment on the basis of age that is "intentional and unfounded." *Smith,* 544 U.S. at 255 (O'Connor, J., concurring in the judgment).

In this case, the EEOC urges us to conclude that it has established a prima facie claim of age discrimination because the KRS plan facially discriminates against older employees in two ways: (1) the KRS plan renders employees ineligible for disability-retirement benefits simply because of their age, which means that disabled workers who are ineligible for disability benefits because of their age receive lower (normal) retirement benefits than otherwise-similar younger workers who become disabled and are able to receive the greater disability-retirement benefits, and (2) the KRS plan uses an employee's age in order to calculate disability-retirement benefits in such a way that an older eligible employee receives lower monthly disability-benefit payments than an otherwise-similar younger disabled worker.

Defendants argue that, contrary to the EEOC's assertion, the KRS plan does not violate the ADEA because the policy does not discriminate "because of age." KRS Br. at 10. Rather, defendants argue, the KRS plan merely uses age as one of several factors to determine benefits, in the same way that age is a factor in many, if not most, retirement-benefit plans. *See* KRS Br. at 13. Defendants also assert that a valid disparate-treatment claim requires a plaintiff to establish proof of discriminatory motive, and that "[t]here is no evidence that the [KRS plan] framework established to provide benefits to disabled members of Kentucky Retirement was in any fashion age-driven." KRS Br. at 26-27.

We consider first the EEOC's argument that it has established a prima facie ADEA claim because the

KRS disability-retirement-benefits plan is facially discriminatory. We then assess KRS's argument that even if the KRS plan is facially discriminatory, the EEOC must produce evidence that the plan was motivated by discriminatory animus against older people in order to sustain its prima facie burden.

A. The EEOC Has Established a Prima Facie ADEA Claim Because the KRS Plan Facially Discriminates on the Basis of Age

The Supreme Court has made clear that an employer's reliance "upon a formal, facially discriminatory policy requiring adverse treatment of employees with that [protected] trait" establishes a prima facie disparate-treatment claim under the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)). In *Thurston*, the plaintiffs were pilots who became disqualified to continue serving in the position of captain when they reached age sixty. Unlike individuals who became disqualified from serving as captain for reasons other than age, the plaintiffs were not granted the privilege of automatically transferring to the position of flight engineer. Instead, former captains who became disqualified from continuing in the position of captain because of their age could obtain only a flight engineer position if they were successful in a bidding process.

A unanimous Court stated that even though the airline was not required to provide transfer privileges to any disqualified captains, "if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this

opportunity to others because of their age." *Thurston*, 469 U.S. at 120-21. *Thurston* held that the plaintiffs had established a prima facie case of age discrimination because "there is direct evidence that the method of transfer available to a disqualified captain depends upon [the captain's] age. Since it allows captains who become disqualified for any reason other than age to 'bump' less senior flight engineers, TWA's transfer policy is discriminatory on its face." *Id.* at 121. *See also City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 715-16 (1978) (finding facial sex discrimination in violation of Title VII where female employees are required to make larger pension contributions than their male counterparts).[4]

When we apply the definition of facial discrimination established by the Court in *Hazen Paper, Thurston,* and *Manhart* to the present dispute, it is apparent that the KRS plan is facially discriminatory on the basis of age in at least two ways. First, like the transfer plan in *Thurston,* the KRS plan categorically excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age. In order to be eligible for disability-retirement benefits, employees in hazardous positions

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[4] Interestingly, the Supreme Court *in Manhart* rejected the defendant's argument that plaintiffs must produce actuarial evidence that the facially discriminatory policy actually had a discriminatory effect on women as a class, and held that the absence of this effect-evidence did not defeat plaintiffs' successful disparate-treatment claim based upon the facially discriminatory nature of the policy. *Manhart*, 435 U.S. at 716.

must become disabled before they reach age fifty-five. There is absolutely no dispute that under the KRS plan, when such an employee becomes disabled at age fifty-five or older, that older employee is adversely treated because of his or her age when compared to a disabled coworker who is similarly situated in all relevant aspects other than age. On its face, this age-eligibility aspect of the KRS plan mandates disparate treatment of disabled employees on the basis of age. Defendants' decision to render employees in hazardous positions ineligible for disability-retirement benefits simply because they have reached normal retirement age is "a formal, facially discriminatory policy" that discriminates on the basis of age, which is sufficient to establish a prima facie ADEA violation. *Hazen Paper,* 507 U.S. at 610.

The KRS plan is facially discriminatory in a second way, in that KRS employees who become disabled when they are still "young enough" to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age. KRS does not dispute that its plan pays lower disability-retirement benefits to an older worker who, apart from age, is similarly situated to a younger worker in all relevant respects. An employee's age, therefore, "actually play[s] a role in" and has "a determinative influence on the outcome" of the amount a disabled employee's disability-retirement-benefit payment is each month. *Hazen Paper,* 507 U.S. at 610. This is a second way that the KRS plan, on its face, requires disparate treatment on the basis of age. *See id.* at 609 (stating that disparate treatment occurs when "[t]he employer simply treats some people less

favorably than others because of their" protected trait) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977)).

The district court's conclusion, compelled by *Lyon*,[5] that the KRS plan does not facially discriminate on the basis of age is also contrary to the Supreme Court's analysis in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989). The KRS plan's disqualification of employees age fifty-five and over for disability benefits closely resembles the characteristic of the plan in *Betts* that the Supreme Court found to be facially discriminatory. *See id.* at 166 (finding that "[o]n its face, the [employee benefit] scheme renders covered employees ineligible for disability retirement once they have attained age 60," but holding that the employer met an exemption under the ADEA because plaintiffs did not provide evidence of "subterfuge"). In response to *Betts*, Congress promptly amended the ADEA to remove the need for proof of subterfuge and to clarify its intent "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are

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[5] Although *Lyon* involved a challenge to the use of age in the determination of the amount of early retirement benefits, we agree with the original hearing panel in this case that the role that age played in the plan at issue in *Lyon* "is not materially distinguishable" from the role that age plays in the KRS plan. *EEOC v. Jefferson County*, 424 F.3d at 471. Both plans compute the disputed benefits in such a way that the employee's age is the determinative factor in the calculation of the benefit amount, with an older employee receiving lower benefits than an otherwise-similar younger employee. *Id.*

justified by significant cost considerations." Older Workers Benefit Protection Act ("OWBPA"), Pub. Law 101-433, § 101, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621).

The original panel in this case considered *Betts* and the legislative history of the OWBPA. *EEOC v. Jefferson County*, 424 F.3d at 474-75. Nevertheless, the original panel ultimately determined that it was unable to distinguish *Lyon* on that ground because the same legislative material was available to the *Lyon* panel. *Id.* (citing, *inter alia*, excerpts of the final debate about the OWBPA stating that "[t]he bill provides that workers who are on disability cannot be forced to receive only their pension at retirement age" and that under the OWBPA, "they will receive the difference between what is typically a lower pension benefit and the higher disability benefit"). We believe that this legislative history is compelling evidence that when revising the ADEA in response to *Betts*, Congress intended to prohibit the very sort of age-based discrimination that the original panel, bound by *Lyon*, condoned in this plan.

That many of our sister circuits have reached conclusions contrary to *Lyon* lends further support for our conclusion that *Lyon's* definition of a prima facie ADEA claim can no longer stand. Since *Lyon* was decided, the Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations. *See Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653 (8th Cir. 2005) (stating that a retirement plan is "discriminatory on its face" because "it is undisputed that an employee is ineligible for early retirement

benefits [under the plan] if he or she is over the age of 65"); *Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 73 (2d Cir. 2004) (finding prima facie case of age discrimination under ADEA when age "is the effective trigger for eligibility" for retirement policy); *Arnett v. Cal. Pub. Employees Ret. Sys.*, 179 F.3d 690, 695 (9th Cir. 1999) (recognizing prima facie disparate-treatment claim when it "is unquestionable that the [e]mployees would have received greater disability retirement benefits but for their older ages at hire"), *cert. granted*, 528 U.S. 1111, *vacated on other grounds by Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Huff v. UARCO, Inc.*, 122 F.3d 374, 387-88 (7th Cir. 1997) (finding employer not entitled to summary judgment on disparate-treatment claim because the early retirement policy "draws an express line between workers over fifty-five and those under").

We conclude that the KRS plan is facially discriminatory on the basis of age, and thus we hold that the EEOC has established a prima facie violation of the ADEA.

B. The EEOC Need Not Provide Additional Proof of Discriminatory Animus, As Discriminatory Intent Is Evidenced by the Facially Discriminatory Nature of the KRS Plan

KRS argues that defendants are entitled to summary judgment because the EEOC has not provided any proof that KRS enacted the disability-retirement-benefits plan because of a discriminatory animus against older workers. Unfortunately for KRS, this argument runs contrary to Supreme Court

authority and the history and purpose of the ADEA. Once a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee "because of" the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself. As the Supreme Court held *in Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991), a plaintiff who has identified a facially discriminatory employment policy need not provide evidence of discriminatory animus to prevail on a disparate-treatment claim. *Johnson Controls* explained:

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.

The Supreme Court reaffirmed this approach in *Hazen Paper,* stating that evidence of intent to discriminate necessary for a disparate-treatment claim "can in some situations be inferred from the mere fact of differences in treatment." 507 U.S. at 609 (internal quotation marks omitted). *See also Jankovitz,* 421 F.3d at 653 (concluding that because retirement plan is facially discriminatory on the basis of age, "intent to discriminate can be presumed"); *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 119 (3d Cir. 1983) (stating that "where an employer's policy or practice is discriminatory on its face, it is unnecessary for the

plaintiff to make a separate showing of intent to discriminate.")

As it was bound by *Johnson Controls* and *Hazen Paper*, the *Lyon* panel at one point correctly recognized that intent to discriminate can be inferred from a defendant's knowledge of a disparate effect. *See Lyon*, 53 F.3d at 139 (stating that plaintiffs have not "alleged that [defendants were] aware of a disparate effect on older employees, such that we could infer intent from knowledge."). *Lyon* later uses language, however, that contradicts not only this earlier recognition but also the above Supreme Court precedent.[6] *See id.*

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[6] The language in *Hazen Paper* upon which defendants, the district court, and the panel in *Lyon* appear to rely for their belief that additional proof of discriminatory motive is required is *Hazen Paper's* statement that "a disparate treatment claim cannot succeed unless the employee's protected trait *actually played a role in* [the employer's decision-making process] and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S. at 610 (emphasis added). A closer analysis of *Hazen Paper* belies defendants' argument. Immediately before making this statement, the Court *in Hazen Paper* gave examples of ways in which the protected trait could actually motivate an employer's decision and therefore constitute disparate treatment. With citations to its previous decisions in *Thurston* and *Manhart*, the Court gave as its first example "a formal, facially discriminatory policy requiring adverse treatment of employees with that [protected] trait." *Id.* It is therefore evident that the *Hazen Paper* language that defendants and *Lyon* cling to in an attempt to argue that *Hazen Paper* added an additional requirement of discriminatory animus was simply the Court's summary statement to describe the various circumstances that can

("Plaintiffs try to cure their lack of evidence of *intent* by inferring discriminatory animus on the basis of a disparate *effect* on older workers. This is circular, and would render meaningless the carefully-wrought distinction between disparate-impact and disparate-treatment theories of discrimination . . . . "). The original hearing panel in this case suggested persuasively that discriminatory "[i]ntent arguably should be inferred from the employer's knowledge concerning its own [retirement] plan," but continued that "[s]uch an argument is, however, foreclosed by *Lyon*." *EEOC v. Jefferson County*, 424 F.3d at 473. The panel continued in its criticism of *Lyon*, explaining why *Lyon's* requirement that a plaintiff alleging disparate treatment must produce additional evidence of a defendant's discriminatory animus where the challenged employment action consists of a benefits plan is misguided because "the only action that will ever be taken in cases involving retirement plans—as opposed to individual adverse actions—is the action of writing the policy." *Id.* We agree, and we hold that an employer's intent to discriminate is directly evidenced by the employer's writing or adoption of a facially discriminatory employment policy.

Finally, KRS's argument that the only disparate treatment on the basis of age that the ADEA was designed to remedy is disparate treatment motivated by discriminatory animus against the old is nonsensical considering the origins of the ADEA. The Wirtz Report, which inspired Congress to enact the

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constitute intentional action sufficient to support a viable disparate-treatment claim.

ADEA, found "no evidence of prejudice based on dislike or intolerance of the older worker." Wirtz Report at 6. Despite the absence of discriminatory animus against older workers, Congress enacted the ADEA to fight arbitrary age discrimination, which Secretary Wirtz defined as age-based assumptions that lacked a basis in fact. *Id.* at 2. Thus for KRS's interpretation of the Act to be correct, it would mean that in passing the ADEA, Congress intended to prohibit only a type of age discrimination that it had been advised did not exist. We will not interpret the ADEA so narrowly and illogically.

There is simply no dispute that under the KRS plan, an employee's age actually plays a role in the defendants' decision-making process about what amount, if any, of disability-retirement benefits an employee receives, and that age therefore has a "determinative influence on the outcome" for the disabled older employee. *Hazen Paper,* 507 U.S. at 610. The KRS plan excludes hazardous-category employees age fifty-five and over from receiving disability-retirement benefits, and pays reduced benefits to older eligible disabled workers compared to their younger counterparts because of their age. The EEOC has established a prima facie ADEA claim.

III. CONCLUSION

The EEOC has established a prima facie case of age discrimination because it has demonstrated that the KRS plan facially discriminates on the basis of age. No evidence of discriminatory animus is needed, as intent to discriminate on the basis of age is directly evidenced by the facially discriminatory nature of the KRS plan.

We **REVERSE** the district court's grant of summary judgment to defendants and **REMAND** to the district court for further proceedings consistent with this opinion.

CONCURRENCE

ROGERS, J., concurring separately. I concur in the result, generally for the reasons expressed in the majority opinion. The following four concerns, however, prevent my concurring in that opinion.

First, the retirement plans at issue in this case discriminate in only one way rather than two. The majority's description of the first way in which the KRS plan discriminates is significant only as it constitutes a part of the second way. That is, it is not facial discrimination to give older workers one kind of retirement plan and younger workers the same plan with a different name. The only real difference between disability retirement and normal retirement is the one caused by the "second" discriminatory characteristic. That is, if the retirement plans were called by the same name, there would be no age discrimination other than that arising from the attribution of unworked years (or more unworked years) based on age. If that discrimination were cured, on the other hand, the "first" way in which the KRS plan discriminates would be semantic only.

Second, in my view it is unnecessary for the en banc court to characterize the panel opinion's

treatment of our court's opinion in *Lyon*. The panel opinion, available as it is in the Federal Reporter, speaks for itself, and in any event the panel opinion has been vacated.

Third, it is only necessary for us to overrule *Lyon* to the extent that *Lyon* is inconsistent with our en banc holding and reasoning. I would leave to future litigants the task of going through *Lyon* and identifying what survives and what does not.

Finally, we should make clear that in this case we take no position on whether the result in *Lyon* can be supported by the early retirement exception to ADEA liability, 29 U.S.C. § 623(f)(2)(B)(ii). The district court in *Lyon* granted summary judgment in favor of the defendants after finding that the plaintiffs had failed to establish a prima facie disparate-treatment claim and, alternatively, that the retirement plan at issue constituted a lawful early retirement incentive plan pursuant to § 623(f)(2)(B)(ii). 53 F.3d at 137. Our court in *Lyon* did not reach the latter issue because it agreed with the district court regarding the plaintiffs' prima facie case. *Id.*

DISSENT

BOGGS, Chief Judge, dissenting. The majority concludes that the disability-retirement plan of the Jefferson County Sheriff's Department, Kentucky Retirement Systems, and the Commonwealth of Kentucky (collectively referred to as "KRS") amounts

to a facial violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, as amended by the Older Workers Benefits Protection Act ("OWBPA"), P. Law 101-433, 104 Stat. 978 (1990). I believe that a careful examination of the plan shows that it considers age only in combination with years of service and years to retirement age, and is a non-discriminatory way of providing workers with protection against disability before they have had an opportunity to earn a normal pension at retirement age. It therefore is not illegal under the Supreme Court's precedent in *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), and I respectfully dissent.

Congress stated that the purpose of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). 29 U.S.C. § 623(a)(1) prohibits an employer from, *inter alia,* "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[1]

The Supreme Court has noted that the ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." *Trans World Airlines, Inc. v.*

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[1] "'[C]ompensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. § 630(l).

Thurston, 469 U.S. 111, 120 (1985) (internal quotation marks and citation omitted). In discussing the ADEA in *Hazen Paper,* the Supreme Court emphasized the distinction between the disparate treatment and disparate impact theories of employment discrimination. 507 U.S. at 609. The Court stated that under a disparate treatment theory, "[t]he employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . ." *Ibid.* (second alteration and ellipsis in original) (internal quotation marks omitted) (quoting *Teamsters v. United States,* 431 U.S. 324, 335-36 n. 15 (1977)).

The Court continued that "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper,* 507 U.S. at 610. The employer "may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait," *ibid.* (citing *Thurston, supra,* and *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 704-18 (1978)), or "may have been motivated by the protected trait on an ad hoc, informal basis." *Ibid.* "Whatever the employer's decisionmaking process," the Court noted, "a disparate treatment claim cannot succeed unless the employee's *protected trait actually played* a role in that process and *had a determinative influence on the outcome.*" *Ibid.* (emphases added).

Defined in that way, the Court added, disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Ibid.* "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Ibid.* This type of stereotyping is nowhere found in the plan under consideration today.

In *Hazen Paper,* the Court addressed the question of whether an employer's firing an employee whose pension was shortly to vest violated the ADEA where the vesting of the pension was based exclusively on years of service. The Court held that although pension status is typically correlated with age, and although it is perhaps true that "older employees of Hazen Paper are more likely to be 'close to vesting' than younger employees," age and years of service were nevertheless analytically distinct. If the employer fired the employee because of pension status, not because of age, "[t]he prohibited stereotype ('Older employees are likely to be _____') would not have figured in this decision, and the attendant stigma would not ensue." Such conduct would not violate the ADEA, the Court held. 507 U.S. at 611-12. (The Court ultimately remanded for a determination of whether the firing had in fact been based on age rather than on years of service. *Id.* at 613.) In short, the Supreme Court held that, under the ADEA, companies could make a decision based solely on the need to save money, even if that decision bore more heavily, on average, on older

workers, so long as the factor relied on was only correlated with age, not determined by age. In our case, with much less base motives, the KRS plan is impacted by age only in relation to years of service and years remaining until normal retirement age, as shown by the examples given on pages 16 and 17, *infra*.

Thurston, an ADEA case cited by the Supreme Court in *Hazen Paper* as one in which the employer's formal, facially discriminatory policy showed intent to discriminate against older employees because of their age, fits comfortably within the "very essence" of the ADEA as discussed by the Court in *Hazen Paper*. In *Thurston*, TWA had adopted a policy by which captains who were disqualified from serving in that capacity for reasons other than age were allowed to transfer to the position of flight engineer, and in the process to "bump" less senior flight engineers. Pilots who were going to be disqualified from continuing to serve as captains because they had reached the age of 60, however, had to resort to bidding procedures in order to become a flight engineer, and if the procedures did not result in a flight engineer position, the captain had to retire at 60. 469 U.S. at 115-17, 120. Under the TWA policy, the following results would obtain. Captain A is disqualified from continuing to serve as captain because he is found to be incompetent. Captain B is nearing age 60. They are otherwise similarly situated. Captain A is allowed to transfer to the position of flight engineer and bump less-senior flight engineers in the process, *id.* at 117; Captain B is not. The Court found that the policy, under which "the method of transfer available to a disqualified captain depends upon his age," was "discriminatory on its face," and therefore amounted to direct evidence of age

discrimination in violation of the ADEA. *Id.* at 121-22. The *Thurston* case is thus an example of a forbidden policy that, in fact, implicates a stigmatizing and inaccurate stereotype—that pilots over age 60 are less capable, or at least less valuable as employees, even than younger workers who have been relieved for incompetence.

TWA's policy clearly embodied the "essence" of what the ADEA sought to prohibit—that is, arbitrary age discrimination. That is not the case with the KRS disability-retirement plan, nor was it the case with the early-retirement policy in *Lyon v. Ohio Education Ass'n and Prof'l Staff Union,* 53 F.3d 135 (6th Cir. 1995). Here, and in *Lyon,* no such stereotype is implicated.

The majority contends that there are two ways in which the KRS plan facially discriminates against older employees. First, workers with less than 20 years of service time (for employees in hazardous positions[2]) who become disabled before a certain age (in the case of employees in hazardous positions, 55) receive additional credit toward retirement, while those over normal retirement age do not receive additional credits (that is, their years to normal retirement age is zero). Second, a disabled worker with fewer years remaining until retirement age may receive fewer additional credits than a worker with

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[2] I follow the convention of the parties, the original panel, and the majority of this en banc court, by referring to the KRS plan for employees in hazardous positions, although the analysis applies to the plan for employees in nonhazardous positions as well.

more years remaining.[3] But the calculations for determining disability benefits for workers who become disabled under age 55 and for normal retirement benefits for those over age 55 are the same, with the exception of the imputed years added to the former's service time.

The original panel succinctly describes how the KRS plan works:

> When workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits. The amount of the yearly benefits is generally calculated as 2.5% of the employee's final compensation times the number of years worked. However, for employees who are not yet eligible for normal retirement (i.e., employees under age 55 and with fewer than 20 years of service), additional years are added to the number of years worked for purposes of the calculation. The number of years added is the number of years remaining until the worker *would have* reached either normal retirement age or twenty years of

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[3] "*May* receive" for two reasons: first, as shown below at pages 16 and 17, a younger worker may only need the same number of years for maximum benefits as an older worker (e.g., in the case of a 40-year-old with 15 years of service and a 50-year-old with 15 years of service), and second, additional credit is limited to the number of years already worked. Thus, a 49-year-old with six service years and a 40-year-old with six service years will each get the same benefit—six additional years of credit.

> service, but no more than the number of years already worked.

EEOC v. Jefferson County Sheriff's Dep't, 424 F.3d 467, 469 (6th Cir. 2005) (footnote omitted), *vacated on grant of reh'g en banc*, 2006 U.S. App. LEXIS 258 (6th Cir. Jan. 4, 2006). The majority argues that because older employees with, e.g., 10 years of service and final pay of $50,000 receive fewer benefits than younger employees with the same years of service and final pay, the KRS plan is facially discriminatory. Yet the majority misses the point that a 53-year-old employee who becomes disabled is not similarly situated to a 33-year-old employee who becomes disabled, even if they have the same service years and final pay at the time of disability. All else being equal, the non-disabled 33-year-old of course has more years to work and live than does a non-disabled 55-year-old. *See Lyon*, 53 F.3d at 137, 140-41 (explaining that an early-retirement plan that "ensure[s] early retirees the same benefits that they would have received had they continued to work until their normal retirement date" did not pay older workers lower benefits *because of age;* two employees of different ages but equal years of service are not similarly situated). Here, the number of years of additional work credit lost is a factor related to, but not determined by, age.

In *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), the Supreme Court confronted a disability-retirement plan that provided age-and-service retirement benefits to those who retired over a certain age (for Betts, the plaintiff, the retirement age was 60) and had a certain number of service years, or to those under the age who had served a set higher

number of years. The plan also provided disability benefits to those under the retirement age who had served a certain number of years and suffered a disability. 492 U.S. at 162. The scheme in *Betts* provided that disability payments would constitute not less than 30% of the disability retiree's final average salary; no such floor existed for age-and-service retirees. Betts became disabled at age 61, and therefore was unable to receive disability benefits. She received in age-and-service benefits just over half what she would have received in disability. *Id.* at 163.

The Supreme Court stated that "[o]n its face, the . . . scheme renders covered employees ineligible for disability retirement once they have attained age 60." Yet the Court found that the scheme did not violate the ADEA because it fit under the then-existing provision of 29 U.S.C. § 623(f)(2) that exempted age-based decisions taken pursuant to the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA. *Id.* at 161-62, 166. A year after the Supreme Court's decision in *Betts,* Congress passed the OWBPA, amending the ADEA. The OWBPA included a finding that "as a result of [*Betts*], legislative action is necessary to restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employment benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." OWBPA, Pub. L. No. 101-433, § 101, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621 note).

In contradistinction to the plan at issue in *Betts*, the case the OWBPA was designed to overturn, the KRS plan does not provide younger workers with a specific benefit unavailable to older workers. In *Betts*, the crucial distinction was that a "disability" retirement gave a worker a guaranteed minimum income of 30% of the worker's final salary. Betts was disqualified from receiving that benefit solely on the basis of age, though she was qualified in every other respect. *Betts*, 492 U.S. at 162-63.

Under the KRS plan, a "disability" retirement is intrinsically no different from the "normal" retirement pension available to every worker. Benefits are based on years of credited service (augmented to a maximum of 20 for disabled workers ineligible for normal retirement), multiplied by a factor related to final salary. If "normal" benefits are greater than the augmented benefits for disability, of course, the greater benefits are provided. The plan simply provides that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service.

This is a very reasonable benefit, and one that a younger worker, in particular, would be more likely to value more highly than a newly-hired older worker, who would be more likely to have acquired other benefits from more extensive earlier employment. The extensive questioning by this court at oral argument, attempting to probe for a way to provide this sensible result under the appellants' reasoning, shows that we

should not be too quick to assume that Congress intended, or commanded by the language it wrote, that such a reasonable plan was being outlawed.

It is worth repeating that the plaintiff here, Mr. Lickteig, is already eligible for "normal" retirement benefits, based on his 17 years of service and his having attained the normal retirement age (55 for employees in hazardous jobs). What he (or rather, what the EEOC on his behalf) is attempting to do in this suit is to prevent employees who have been granted a form of insurance against disability at a pre-retirement age from obtaining that benefit.

Several examples show how the KRS plan does not differentiate based on age, but on age only in relation to years of service.

1) Take two employees of the same age. One is 48 with 10 years of service, the other is 48 with 15 years of service. They both become disabled. The first employee gets 7 years of extra credit, which takes him to age 55, and the second gets 5 years of extra credit, which takes him to 20 years of service, but in each case it is as if the employee had worked until eligible for normal retirement.

2) Take two employees with the same service. One is 50 with 15 years of service. The second is 35 with 15 years of service. They both become disabled. They each get exactly the same additional credit - 5 years - despite the difference in their ages, and with that additional credit, it is as if each had worked until eligible for normal retirement.

3) Take two employees with differing ages and years of service. The first is 45 with 10 years of service. The second is 40 with 17 years of service. They both become disabled. This time, the older worker actually gets a greater benefit because he will get credit for all of the 10 years that would bring him to the retirement age, whereas the younger worker will "max out" at the full 20 years of credit with only an additional 3 years of credit.

These examples demonstrate starkly that age is not a controlling variable in the operation of the KRS plan. They also show that the plan provides in practice exactly what was claimed for it by appellees' counsel in the argument before us: a way to insure against disability that is sensitive to the greatest loss caused by disability—the inability to continue earning credits toward retirement at a normal retirement age.

Many life insurance policies have a feature that if premiums are paid from the inception of the policy to age 65, no further premium payments are required. Some also have a feature called "disability waiver of premiums": if the policy holder becomes disabled, the insurance company will no longer collect premiums, in effect crediting the policyholder as though those premiums are being paid. Yet, on average, such a disability feature (which no one would contend constitutes age discrimination) works exactly like the KRS plan. The waiver feature is worth more to the person who is disabled at 40 than one who is disabled at 60, because, on average, the waiver is in effect for many more years. And one who is disabled after 65 receives no benefit at all, as the premium is already fully paid up.

It is undisputed, and patently obvious from the nature of the KRS plan, that both the rationale and the effect of that plan is to insure that all employees have a reasonable prospect of employer-sponsored insurance against a disability that occurs before retirement income becomes available. On average, if employee A is younger than employee B and both suffer the same disability at the same time, A 1) will have had less time to earn money and retirement credit, and 2) will have more years to live. The KRS plan is meant to, and does, ameliorate exactly the ways in which A and B are not similarly situated, by providing A with a "bonus" for the circumstances of the disability. That "bonus" depends on years of service and years to normal retirement age. The bonus will often, but not always, be larger for a younger worker than an older one. As the examples show, the bonus provided to employees who become disabled can vary from no additional credit to as much as 10 years' credit, in a fashion that may be correlated (just as pension status in *Hazen Paper* was correlated) with age, but far from perfectly.

The KRS plan has nothing whatever to do with "inaccurate and stigmatizing stereotypes" surrounding the relative ability of older employees to do the job—that is to say, Congress's reason for enacting the ADEA, as the discussion above and the majority's own analysis of the legislative history indicate (Maj. Op. pp. 6—7). There is no intimation in any part of the KRS plan of any demeaning or inappropriate stereotyping of older workers. All employees who are considered disabled under the KRS plan are equally unable to do their jobs—because of disability. The only factor resembling consideration of the nature of aging

that counsel for appellants could adduce at oral argument was that some older employees might wish to work beyond normal retirement age (55 for hazardous employees, 65 for nonhazardous employees). But that does not differentiate between workers who are now more advanced in years and those younger. All such workers may wish to (and, had they not become disabled, might have been able to) work beyond that normal retirement age. But any retirement plan must have criteria for qualification, and using age as one of the criteria has never been thought to violate the ADEA. If KRS changed the plan to have a later retirement age, the mathematics of some of the computations would change, but the aspect being attacked here would remain. Thus, it is clear that impermissible stereotyping had nothing to do with the age-correlated features of the plan that are involved here.

Under the KRS plan, the employee's age *in relation to his years of service with the employer* factors into retirement benefits calculations. The majority, by dubiously labeling that plan as facially discriminatory under the ADEA, uses that statute to invalidate a policy that lies far from the "essence" of the ADEA—and, in fact, does not implicate that essence at all. Age in relation to years of service performed for this employer is not the same as age qua age. *See Hazen Paper*, 507 U.S. at 612 (the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore.").

There is a further problem with the majority's analysis. As the *Lyon* court noted, in reasoning that applies at least as much to this case:

> [The employer's] very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated plaintiff's "problem." Those most "disadvantaged" are those who were oldest at the time of hiring. It would be contrary to the letter, as well as the spirit, of the ADEA to penalize the employer for the incidental ramifications of objectivity.

53 F.3d at 140 n.6. Here, the older workers "discriminated against" are sometimes exactly those who were hired later in life, and thus had not accumulated as many years with this employer as a younger worker (although, as example 3 shows *(supra,* at 17), sometimes exactly this factor will give the later-hired older worker an advantage). Thus, I believe that neither the intent nor the letter of the ADEA bars the reasonable KRS retirement plan, and I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-6437

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, — Plaintiff - Appellant

v.

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, AND THE COMMONWEALTH OF KENTUCKY, — Defendants - Appellees

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the granting of summary judgment to defendants by the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER
OF THE COURT

/s/
Leonard Green, Clerk

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No. 06-1037

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In The

Supreme Court of the United States

Kentucky Retirement Systems,
Commonwealth of Kentucky, and
Jefferson County Sheriff's Department,
Petitioners,

v.

Equal Employment Opportunity Commission,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

The Commonwealth of Kentucky has established a statutory retirement plan for public servants. Employees are eligible to retire either (1) after serving 20 years; or (2) after reaching age 55 with five years of employment, whichever milestone comes first. If an employee is disabled before reaching either milestone, the plan accelerates the employee to the nearest retirement milestone by imputing additional years of service, and calculates retirement benefits based upon those imputed years. Any distinction between categories of disabled employees is not based on age per se, but is based upon whether they are eligible to retire, which could (but does not necessarily) depend on age.

The question presented is whether the relevance of age as a potential factor in the distribution of retirement benefits to disabled workers establishes a prima facie case of arbitrary discrimination, in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*?

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The en banc opinion of the United States Court of Appeals for the Sixth Circuit, dated October 31, 2006, is reported at *EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006), and is reproduced at J.A. 56-99. The opinion of the three-judge panel for the Sixth Circuit, dated September 19, 2005, is reported at *EEOC v. Jefferson County Sheriff's Department*, 424 F.3d 467 (6th Cir. 2005), and is reproduced at J.A. 36-55. The September 4, 2003, order entered by the U.S. District Court for the Western District of Kentucky is unofficially reported at *EEOC v. Jefferson County Sheriff's Office*, No. 99-500-JBC, 2003 U.S. Dist. LEXIS 18998 (W.D. Ky. Sept. 3, 2003), and is reproduced at J.A. 24-35.

JURISDICTION

The Court of Appeals sitting en banc entered an order and opinion on October 31, 2006, finding various provisions of the Kentucky retirement statute facially discriminatory in violation of the ADEA. Petitioners filed a petition for writ of certiorari on January 23, 2007, which this Court granted on September 25, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves interpretation of 29 U.S.C. §§ 621 and 623, which are reproduced in the Statutory Appendix at 1a-2a. The salient terms of the retirement plan at issue in this case are set out in Kentucky Revised Statutes §§ 16.505(15), 16.576, 16.582, 61.592, and 78.545 (1998), as well as KRS

§ 16.577 (2000) and KRS § 16.577(2) (2001), which are reproduced in relevant part in the Statutory Appendix beginning at 2a. All references to Kentucky Revised Statutes will be to the 1998 edition unless otherwise indicated, and will be cited as "KRS § ____."

INTRODUCTION

The Court of Appeals has presented this Court with a paradox. Everyone agrees that it is permissible—indeed, common—for an employer to offer employees disability benefits that terminate the moment the employee becomes eligible to retire. Everyone agrees that it is permissible for an employer to offer a retirement plan that fixes eligibility based on age. The practice is so ubiquitous that it is scarcely a stretch to say that "all retirement plans necessarily make distinctions based on age." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 207 (1977) (White, J., concurring). Yet, the Court of Appeals has held that it is illegal to combine the two features in one plan.

Kentucky, like virtually every public employer in the nation, has a defined-benefit retirement plan designed to attract and retain qualified employees. Employees can qualify for "normal retirement" by either (1) completing 20 years of service or (2) reaching age 55 with five years of service. There is no mandatory retirement age. If an employee is disabled before reaching either milestone, Kentucky gives him a safety net called "disability retirement."

In structuring its benefits, Kentucky made a decision not to provide *disability* retirement benefits to an employee who is already eligible for

normal retirement by virtue of having reached either milestone. It decided not to give a safety net to an employee who does not need one. Insurance companies make the same decision when they sell term disability policies. Congress made the same judgment when it designed its gigantic Social Security Disability program. But when Kentucky made that judgment, the EEOC accused it of age discrimination.

The EEOC is wrong. The disability retirement statute does not differentiate among employees based on *age*; it differentiates among them based on *eligibility for normal retirement*. Anyone who is eligible for normal retirement—on either prescribed basis—cannot recover disability benefits, regardless of age. The undisputed evidence was that Kentucky's retirement statute was neither arbitrary nor infected by inaccurate ageist stereotypes. The language of the ADEA and the decisions interpreting it confirm that Kentucky's retirement statute, which is designed in crucial ways to attract older works, is legal. The Court of Appeals should be reversed.

STATEMENT OF THE CASE

Kentucky's Retirement Statute

The Commonwealth of Kentucky maintains a defined-benefit retirement system covering hundreds of thousands of state, county, and municipal employees. All the material terms of the benefits are defined by statute. The plan is funded from a single trust. KRS § 78.520. The trust consists of contributions from both employers and employees, along with earnings on investments. *Id.* §§ 78.615, 78.650.

Under the Kentucky retirement statute, a crucial moment for any employee is the point at which the employee becomes eligible for "unreduced retirement benefits." *See* J.A. 21-22. That is when the employee is assured that he has a guaranteed income stream for the rest of his life, regardless of what unexpected turns it may take. Kentucky law prescribes that, under normal circumstances, a public employee is eligible to retire with unreduced benefits upon crossing either of two thresholds, whichever comes earlier.[1] J.A. 21-22. One route to "normal" retirement allows an employee to retire after completing 20 years of credited service. KRS §§ 16.505(15), 17.576(1). Thus, for example, an employee who begins working for the government at age 20, is eligible to retire after 20 years of service, at age 40. For obvious reasons, this route to normal retirement is called "service retirement."

The other route to normal retirement is when an employee reaches age 55 and has at least five years of service under his belt. *Id.* §§ 16.505(15), 16.576(1).[2] So, for example, an employee who

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[1] The EEOC has pursued this challenge in connection with a claim by a "hazardous duty member," a class that includes firefighters, police officers, corrections officers, and others whose jobs are especially dangerous. KRS § 61.592; *see id.* § 78.545(40). Consequently, the parties and courts have confined their discussion to the provisions governing this class. All agree that the comparable statutes that apply to other members have essentially the same structure, albeit with different numerical thresholds for age and years of service. *See, e.g.*, J.A. 38-39, 60 n.1, 62.

[2] Although not part of the benefits structure at issue in this case, Kentucky provides an additional benefit only to

(footnote continued...)

begins working at age 40 is eligible to retire at age 55, having served only 15 years. Likewise, an employee who begins a public sector job at age 50 is eligible to retire upon reaching 55, after only five years of service. This second option is of enormous benefit to older employees like the hypothetical 50-year-old just mentioned, for he might never get a penny of retirement benefits if eligibility were conditioned only on his ability to labor 20 years in a hazardous job.

There is no rule that an employee must retire upon reaching either milestone of normal retirement—either the 20-year threshold of service retirement or the alternative threshold of age 55 with five years of service. The employee simply has the option of retiring at that point, or any point thereafter, with full benefits.

(continued from previous page)
employees 55 or older: After only one month of service, an employee who has served less than five years and becomes disabled will get a so-called "money purchase plan." KRS § 16.576(6). This benefit is not available to any employee who is under 55.

The terminology has been in flux over the years. At the time relevant to this case, the statutory provisions used the term "normal retirement" to encompass both routes to retirement described in the text—whether the employee satisfied the service threshold or the threshold of age 55 plus five years of service. *Id.* § 16.505(15). This brief adopts this convention, although we acknowledge that (because of subsequent changes in the statute) the parties at times use the phrase "normal retirement," as distinguished from "service retirement," to cover *only* the situation where an employee is eligible to retire at age 55 with five years of service. *See* J.A. 21-22 & n.3.

When an employee who is eligible for normal retirement avails himself of that benefit, he collects retirement payments that are fixed by formula. Like all defined-benefit retirement plans, the precise amount of benefit is a function of both the employee's compensation averaged over a period of years (called "final compensation") and the length of his service. *Id.* § 16.576(3). Specifically, the formula calculates benefits by taking a fixed percentage of the employee's final compensation (2.5%) and multiplying it by the number of years the employee has served. *Id.* By way of example, an employee who worked 30 years and retired with final compensation of $60,000 a year would have a healthy annual pension of $45,000 ($60,000 × 30 × 2.5%). *Id.*

Kentucky's Retirement Safety Net for Disabled Workers

Sadly, some employees cannot make it to either retirement milestone because they become disabled before attaining eligibility for normal retirement. Under many private retirement plans, the employee would be out of luck, and would get no retirement benefits. Some private employers offer the employee a separate disability plan, which typically covers the employee until the point of eligibility for retirement.

Kentucky thought it was critical to provide a safety net to disabled employees who find themselves in this unfortunate position. But Kentucky does not achieve this end by providing a separate disability policy. Rather, the underlying premise of Kentucky's approach is "a policy determination that [all] the members of the plan should receive some kind of *retirement* benefit."

J.A. 21 (emphasis added). Hence, Kentucky protects the disabled employee who is *not already* eligible for retirement by providing a *third* route to retirement eligibility. KRS § 16.582. It is called "disability retirement," as distinguished from normal retirement. *Id.*[3]

Eligibility for disability retirement. The uncontroverted evidence (which must be taken as true in this summary judgment posture) was that "the motivating factor behind establishing [disability retirement] benefits, was to provide assistance to members who *would not have a source of income* through unreduced retirement benefits." J.A. 22 (emphasis added). In keeping with this rationale, Kentucky's basic approach is to award the disabled employee a retirement benefit that is roughly equivalent to what she would have earned had she worked up to the closest milestone of retirement eligibility. If, for example, the first date of eligibility for an employee would have come only after the employee worked 20 years, then the employee is accelerated to that milestone of service

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[3] As the Court of Appeals noted, the Kentucky Legislature has made technical changes to how eligibility for disability retirement is described. J.A. 39 n.1. The 1998 version of the statute provided that an employee was not eligible to receive disability retirement benefits unless he was "less than normal retirement age." *Id.* Since 2000, the trigger is described, more accurately, as being when the employee is "eligible for an unreduced retirement allowance." KRS 16.577(2) (2001). The change was only cosmetic; there is no dispute that eligibility for service retirement (and not just "retirement age") would have disqualified an employee from disability retirement at all times to this case. *Id.* §§ 16.505(15), 16.582(5)(a) & (b).

retirement. If, however, the employee would have first been eligible upon reaching 55 with five years of service, then the employee would be accelerated to that milestone of normal retirement. Either way, the disabled employee would be boosted to that critical juncture of entitlement to an unreduced benefit, just like employees who reach eligibility for normal retirement.

Benefits calculation. Kentucky imputes those additional years of service to the disabled employee for purposes of calculating the amount of the benefit as well. KRS § 16.582(5)(a). The employee who started at 20 and becomes disabled at 35 will be credited with five additional years of service—the number of years it would take to get to the first eligibility milestone (20 years, for service retirement). The employee who started at 45 and becomes disabled after five years will get an additional five years of service credited--enough to get him to the normal retirement eligibility milestone (55 with at least five years of service).

Through this mechanism, employees who are disabled receive the same, or nearly the same, retirement benefits they would have received had they not become disabled. Some disabled employees will not get exactly the same benefits they would have received but for the disability, because there is a limit to the number of years that will be imputed for purposes of calculating the *amount* of the retirement benefit. Regardless of which eligibility threshold is applied, the number of imputed years is capped at the number of years the employee had worked before becoming disabled. *Id.* So an employee who worked from age 20 to age 30 and then became disabled, will

receive a full credit of 10 years (because he worked 10 years and needs only another 10 years to be eligible for service retirement based upon 20 years of service). But if that same employee was disabled at, say, 27 (after seven years of service), the employee would receive an imputed service credit of only seven years toward the benefits calculation (for a total of 14 years of service). That is because it would take 13 years to get to the point of retirement eligibility, but the number of imputed years is capped at seven, the number of years he has already worked.

Relationship Between Age and Disability Retirement Benefits

As is evident from this description of both the purpose and the mechanics of Kentucky's plan, the benefits available to disabled employees are not a supplement to normal retirement, but a substitute for those who never make it that far. By definition, and design, this third route is inapplicable to an employee who becomes disabled *after* crossing one of the eligibility thresholds for normal retirement. That employee does not need the safety net of the third route to retirement, because she can already claim unreduced benefits by having crossed one of the other two milestones.

As to the calculation of disability retirement benefits, the Kentucky retirement statute does not adopt any rule—express or implied, practical or theoretical—that older employees recover less than younger ones, or get fewer years credited. To the contrary, under many circumstances the older employee fares better than the younger. That is because the organizing principle does not revolve around the employee's age; it revolves around the

employee's eligibility for normal retirement, which sometimes is not a function of age at all (in the case of service retirement), and is never a function of age alone (even in the case of retirement at the threshold of age 55 with five years of service).

Chief Judge Boggs punctuated the point, in his en banc dissent, with three vivid illustrations. The first is an example of two employees who are exactly the same age, but nevertheless end up with different credits toward retirement:

> 1) Take two employees of the same age. One is 48 with 10 years of service, the other is 48 with 15 years of service. They both become disabled. The first employee gets 7 years of extra credit, which takes him to age 55, and the second gets 5 years of extra credit, which takes him to 20 years of service, but in each case it is as if the employee had worked until eligible for normal retirement.

J.A. 93. The second example illustrates how two employees who are years apart in age will end up receiving the same credit:

> 2) Take two employees with the same service. One is 50 with 15 years of service. The second is 35 with 15 years of service. They both become disabled. They each get exactly the same additional credit—5 years—despite the difference in their ages, and with that additional credit, it is as if each had worked until eligible for normal retirement.

Id. The third illustrates how an older employee can end up with many more years of service credit than a younger colleague:

> 3) Take two employees with differing ages and years of service. The first is 45 with 10 years of service. The second is 40 with 17 years of service. They both become disabled. This time, the older worker actually gets a greater benefit because he will get credit for all of the 10 years that would bring him to the retirement age, whereas the younger worker will "max out" at the full 20 years of credit with only an additional 3 years of credit.

J.A. 94. As Chief Judge Boggs succinctly put it: "These examples demonstrate starkly that age is not a controlling variable in the operation of the KRS plan." *Id.* "They also show that the plan provides in practice exactly what" Kentucky set out to achieve, which is, "a way to insure against disability that is sensitive to the greatest loss caused by the disability—the inability to continue earning credits toward retirement at a normal retirement age." *Id.*

An Employee Complains

This case arises from the complaint of one employee, Charles Lickteig, to the Equal Employment Opportunity Commission (EEOC). J.A. 9, 24. Mr. Lickteig joined the Jefferson County Sheriff's Department late in his career, at the age of 44. J.A. 60. After 11 years, he was eligible to retire with a pension, because he reached the normal-retirement milestone, having turned 55 (and passed the five-year threshold). He opted to continue working. J.A. 18. Six years after passing the threshold for retirement eligibility, Mr. Lickteig claimed disability. *Id.* At that point he was 61 years old, and had served nearly 18 years.

In keeping with the plan, Kentucky gave Mr. Lickteig his normal-retirement benefits. *Id.* Like any other employee who is eligible for retirement, his benefits were calculated based upon his final compensation and his almost 18 years of service. J.A. 26. Mr. Lickteig argued that it was unfair to treat him differently from a younger disabled employee who had not already achieved eligibility for retirement. J.A. 28-29.

The EEOC Sues Alleging Intentional Age Discrimination

The EEOC sued Petitioners Kentucky Retirement Systems (KRS), the Jefferson County Sheriff's Department, and the Commonwealth of Kentucky (collectively referred to as "Kentucky") in the United States District Court for the Western District of Kentucky. The EEOC alleged that the statutory provisions describing Kentucky's retirement plan violate the ADEA. J.A. 9-16. Specifically, the EEOC alleged that "since at least October 16, 1992, Defendants have discriminated against a class of individuals aged forty (40) or over on the basis of age by maintaining a disability retirement program which denies benefits or pays reduced benefits, because of age." J.A. 9.

The EEOC's sole theory was disparate treatment—that the Kentucky retirement statute intentionally discriminates against older employees. J.A. 12. The EEOC does not contend that an older public servant in Kentucky necessarily receives lower benefits than a younger one. Rather, the EEOC claims that there are circumstances where that can happen. J.A. 74-75; 88-89 & n.3. Because of that possibility, the EEOC asserts, the statutory scheme discriminates on its

face against older workers.

The Age Discrimination Claim Is Dismissed on Summary Judgment

The parties cross-moved for summary judgment. Kentucky "argue[d] that, contrary to the EEOC's assertion, the KRS plan does not violate the ADEA because the policy does not discriminate '*because of* age,'" J.A. 71 (emphasis added); the focal point of the inquiry is not age, but eligibility for retirement. J.A. 31. Kentucky also argued that any consideration of age in certain circumstances does not violate the ADEA, because age was not a motivating factor in the retirement statute's design. J.A. 72, 80.

In support of its motion, Kentucky introduced the evidence quoted above establishing that "the motivating factor behind" the disability retirement provisions was "to provide assistance to members who are unable to continue working, but would not have a source of income through unreduced retirement benefits." J.A. 22.

The EEOC offered no evidence countering this explanation. Instead, the EEOC argued that regardless of the undisputed "motivating factor" behind the disability provisions, the statute illegally discriminates: Just because age could be a factor in determining eligibility for disability retirement, and the calculation of benefits, the statute violated the ADEA on its face.

Rejecting the EEOC's argument, the District Court granted summary judgment in Kentucky's favor on two grounds. J.A. 32. First, the District Court rejected the EEOC's argument as "illogical." J.A. 28. The Court explained that "age will always

be a factor in retirement plans," so the mere use of age as a factor in the statute was not enough to make the statute facially discriminatory. J.A. 32. Second, the District Court also held that even if the Kentucky retirement statute did differentiate "because of ... age," that does not establish a prima facie case. *Id.* Liability under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, depends on whether age *actually* motivates the decision of the party accused of discrimination," and there was no such evidence in this case. J.A. 27-28 (emphasis added).

The Court of Appeals Panel Affirms

The EEOC appealed to the Court of Appeals for the Sixth Circuit. The centerpiece of its appeal was a series of charts intended to establish that the statute may have a disparate *impact* on older workers, which is irrelevant in a disparate-treatment case. J.A. 42; *see also* J.A. 64. Kentucky countered by citing an equal number of examples in which a younger worker would receive less imputed service than an older one. The three-judge panel unanimously held that the statute did not violate the ADEA. J.A. 48, 54. Relying on an earlier precedent involving a similar plan, the panel echoed the District Court's analysis on both points. First, "'the ADEA protects workers only from an employer who intended discrimination *because of* age.'" J.A. 46 (quoting *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 138 (6th Cir. 1995)). Second, "the EEOC has failed to demonstrate discriminatory intent." J.A. 49. The panel also noted that an employee who begins work when older will have less time to accumulate years of service and therefore will receive a lower benefit

upon reaching the eligibility for normal retirement, all other things being equal. J.A. 47.

The En Banc Court Reverses, Over a Vigorous Dissent

The Court of Appeals granted rehearing en banc, and a sharply divided court reversed, disagreeing with both the District Court and the unanimous panel.

Majority opinion. The en banc majority held that the EEOC had established a prima facie case of discrimination. J.A. 59. Rejecting Kentucky's argument that the statute did not discriminate "because of ... age," the Court of Appeals held that Kentucky's retirement statute was "facially discriminatory on the basis of age" for two reasons: "First, ... the plan categorically excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age." J.A. 73 (emphasis in original). Second, "employees who become disabled when they are still 'young enough' to be eligible for retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." J.A. 74.

The Court of Appeals also rejected Kentucky's argument that the EEOC has to prove discriminatory motive to establish a prima facie case. J.A. 77-80. The court correctly observed that Congress believed there was "no evidence of prejudice based on *dislike or intolerance* of the older worker." J.A. 80-81 (internal quotation marks omitted; emphasis added). Rather, Congress was motivated "to fight arbitrary age-

based *assumptions* that lacked a basis in fact." J.A. 81. The court characterized Kentucky's argument as "mean[ing] that in passing the ADEA, Congress intended to prohibit only a type of age discrimination that it had been advised did not exist"—which, obviously, would be "nonsensical." J.A. 80-81. But the court never addressed Kentucky's argument that there is no ADEA violation unless a plan was arbitrary in that it indulged ageist assumptions.

Dissent. Chief Judge Boggs wrote a dissent that three other judges joined. The dissenting judges insisted that Kentucky's statute did not discriminate "because of ... age." J.A. 90. Indeed, it was clear to the dissent that "impermissible stereotyping had nothing to do with the age-correlated features of the plan." J.A. 96. They argued that "[u]nder the KRS plan, the employee's age *in relation to his years of service with the employer* factors into retirement benefits calculations." *Id.* (emphasis in original). But "[a]ge in relation to years of service performed for this employer," they insisted, "is not the same as age qua age." *Id.* (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993), for the proposition that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore").

The dissenters took note of the irony of "dubiously labeling that plan as facially discriminatory under the ADEA." *Id.* As the dissent observed, Kentucky finds itself in this awkward position precisely because it went out of

its way to devise a retirement plan that was especially generous to older workers. "Those most 'disadvantaged' are those who were oldest at the time of hiring." J.A. 97 (quoting *Lyon*, 53 F.3d at 140 n.6). Thus, Kentucky's "very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated plaintiff's 'problem.'" *Id.* (quoting *Lyon*, 53 F.3d at 140 n.6). In the end, the dissenters concluded that the majority had used the ADEA "to invalidate a policy that lies far from the 'essence' of the ADEA—and, in fact, does not implicate that essence at all." J.A. 96. "It would be contrary to the letter, as well as the spirit, of the ADEA to penalize the employer for the incidental ramifications of objectivity." J.A. 97 (quoting *Lyon*, 53 F.3d at 140 n.6).

SUMMARY OF ARGUMENT

This is a disparate treatment case. The EEOC cannot prevail by showing merely that some older disabled employees may not fare as well as some younger ones under the Kentucky retirement statute. The Court of Appeals' judgment must be reversed unless the EEOC demonstrates that Kentucky's retirement statute "*discriminate[s]* against" older employees "*because of* [their] age." 29 U.S.C. § 623(a)(1) (emphasis added). The EEOC fails for two independent reasons: (I) any differentiation among disabled employees is not "because of [their] age"; and (II) Kentucky's retirement statute does not "discriminate" in the sense in which Congress used the term in the ADEA.

I. Kentucky's retirement statute does not differentiate among categories of disabled

employees "because of ... age." It differentiates disabled employees who are eligible for normal retirement from those who are not.

The disability plan is a safety net reserved for those employees who have not made it to normal retirement. It is only natural to define eligibility for the safety net with reference to when the safety net is needed. An employee who is *already* eligible for normal retirement benefits is not eligible for disability retirement, because he does not need it. The ineligibility is not "*because of* [his] age." He is ineligible for disability retirement because of his eligibility for another source of income.

Several structural elements of Kentucky's statute confirm that any differential treatment—whether as to eligibility or as to the calculation of benefits—is not "because of ... age," but because of retirement eligibility. First, all the rules—as to eligibility and benefits calculation—apply with equal force to all employees who are eligible for normal retirement, including those who are eligible because they have reached the 20-year milestone of service retirement (which has nothing to do with age). Second, for many employees, age simply has no bearing either on eligibility for disability retirement benefits or on the amount of those benefits. Third, sometimes older disabled employees fare better than younger ones.

The distinction between a policy that revolves around eligibility and one that revolves around age is dispositive. Both this Court's ADEA jurisprudence and its Title VII jurisprudence underscore the distinction. In either context, the overarching rule as to the meaning of "because of" is the same: "a disparate treatment claim cannot

succeed unless the employee's protected trait actually played a role in that process *and had a determinative influence on the outcome.*" *Hazen Paper*, 507 U.S. at 610 (emphasis added). There is no disparate treatment claim when there is a "lack of identity between the excluded disability and [the protected trait] as such." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976) (internal quotation marks omitted).

II. There is a second, and independent, reason that the EEOC has not established a prima facie case of age discrimination: Even if the disability provisions of the Kentucky retirement statute could be said technically to *differentiate* among employees "because of ... age," the difference does not amount to "*discriminat[ion]*"—in the sense in which Congress used that term in the ADEA.

In the ADEA, Congress declared that its "purpose" was not to prohibit all differentiations on the basis of age, but only "to prohibit *arbitrary* age discrimination in employment." 29 U.S.C. § 621(b) (emphasis added). As this Court has held, Congress was "aware that there were legitimate reasons as well as invidious ones for making employment decisions on age." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004). And Congress intended to target only discrimination that was "arbitrary," in the sense of being based upon "inaccurate and stigmatizing stereotypes." *Hazen Paper*, 507 U.S. at 611.

Contrary to the Court of Appeals' view, the EEOC could not establish a prima facie case just by pointing to the statute itself, unless the arbitrariness—i.e., stereotype-based motivation—appears on the face of the statute. In this respect,

the rules governing how and when it is permissible to draw such definitive inferences of discriminatory intent in an age discrimination case apply differently from the rules governing such inferences in cases involving explicit classification on the basis of race or gender. The application must differ because Congress believed (and this Court has held) that the nature of the discrimination is different.

Because Kentucky's retirement statute is not arbitrary—i.e., not based on inaccurate ageist stereotypes—the EEOC has failed to establish a prima facie case of age discrimination. It is rational to provide the safety net of disability benefits only to those who are not yet eligible for retirement benefits. That is what private insurers do, and what Congress did in its Social Security Disability program. The truth is, Kentucky's retirement statute is extraordinarily favorable to older workers. The irony of this case is that the very attribute that makes the plan so attractive to older workers—the ability to retire at age 55 after have spent little time on the job—is the feature that the EEOC has condemned as age discrimination.

ARGUMENT

I. THE EEOC FAILED TO ESTABLISH A PRIMA FACIE CASE BECAUSE KENTUCKY'S RETIREMENT STATUTE DOES NOT DIFFERENTIATE AMONG EMPLOYEES "BECAUSE OF ... AGE."

Kentucky's retirement statute does not differentiate among categories of disabled employees "because of ... age." It differentiates between disabled employees who are eligible for

normal retirement and those who are not. *See* Point I.A. Under this Court's precedents, that distinction is dispositive. *See* Point I.B. The Court of Appeals erred in concluding that the Kentucky retirement statute is discriminatory on its face simply because age is a factor in reaching one milestone to normal retirement. *See* Point I.C.

A. Kentucky's Retirement Statute Does Not Differentiate "Because of" Age, But Differentiates Based Upon the Availability of a Retirement Safety Net.

The EEOC concedes that Kentucky's eligibility rules for normal retirement are perfectly legal. It is, of course, permissible to premise retirement benefits on an employee's length of service. And it is so routine to condition retirement benefits on reaching a particular age, that it is not much of an overstatement to say "all retirement plans necessarily" do it. *United Air Lines*, 434 U.S. at 207 (White, J., concurring). If Kentucky's retirement statute had limited itself to providing retirement benefits only to employees who reached either of the two milestones for normal retirement, the EEOC would never have brought this case.

This case is here because Kentucky opted to boost unfortunate employees who become disabled *before* reaching eligibility for normal retirement. Had Kentucky behaved like many employers in the private sector, employees in this category would have no income to sustain them once they became disabled—no salary, no disability benefits, and no retirement benefits. But the EEOC claims that the special accommodation is illegal. The EEOC alleges age discrimination along two dimensions: (1) in the rules governing eligibility for disability

retirement; and (2) in the calculation of benefits. It is wrong on both fronts.

As to eligibility, it is only natural to define eligibility for a safety net with reference to when the safety net is needed. An employee who is *already* eligible for normal retirement benefits is not eligible for disability retirement, because he does not need it. The ineligibility is not "because of [his] age." He is ineligible for disability retirement *because* of his eligibility for another source of income. He is ineligible for disability retirement because he has already reached the goal of the statute—normal retirement.

To argue otherwise is like accusing an employer of age discrimination for refusing to pay a salary to a retired employee. To be sure, the employee who retires when he reaches retirement age is deprived of a salary that younger employees are earning. He, too, can say that but for his age he would never have retired. But the reason for the differentiation is not because the employee is 55, but because the employee is retired.

The same principles apply to the calculation of benefits. It is possible that a disabled employee who is 54 will receive a lower benefit than an employee who is 35 with the same years of service. But if so, the differential treatment is not because of their respective ages per se, but because of their relative proximity to (or distance from) a lawful retirement eligibility milestone—whichever milestone it may be.

Likewise, it is true that Mr. Lickteig was not credited with the additional couple of imputed years that a disabled employee of 40 would have

received with the same nearly 18 years of service. But that, again, is not *because* Mr. Lickteig was 61. It is because he was eligible for normal retirement, and the 40-year-old is not. Thus, with regard to the controlling factor—proximity to normal retirement—the two are not similarly situated. Nor are they similarly situated with regard to the motivating philosophy underlying the disability safety net. An employee in Mr. Lickteig's position has had an extra 21 years to devote to making money, providing for himself and his family, saving funds for retirement, and accruing years that will increase his retirement benefits. Thus, the 40-year-old employee is likely to need more of a boost.

Several structural elements of Kentucky's statute confirm that any differential treatment[5] whether as to eligibility or as to the calculation of benefits—is not "because of ... age," but because of retirement eligibility. First, all the rules—as to eligibility and the benefits calculation—apply with equal force to an employee who is closer to the 20-year milestone. Regardless of which milestone is closer, the statute directs that: (1) the employee accelerates to that retirement milestone; and (2) the employee is credited the years it will take him to get to the relevant milestone.

Second, for many employees, age simply has no bearing either on eligibility for disability retirement benefits or on the amount of those benefits. For anyone who would be destined to reach the 20-year service threshold before turning 55 (i.e., anyone who started work before age 35), age is irrelevant to the equation.

Third, as Chief Judge Boggs illustrated, an older disabled employee could fare better than a

younger one. *See supra* at 10 (example 3); J.A. 94. A 40-year-old firefighter with 17 years of service is just as likely to become disabled as a 45-year-old firefighter with 10 years of service. The younger firefighter gets three years of imputed service, bringing him to 20 years of service; the 45-year-old gets 10 years of imputed service bringing him to age 55 (with at least five years of service). The *older* one gets more of a boost.

In short, the factors that dictate both eligibility for disability retirement and the amount of the benefit are the factors described in the statute itself: (1) whether the employee is already eligible for normal retirement; (2) if not, how far the employee is from the point of being eligible for normal retirement; and (3) how long the employee has already worked. Sometimes, there will be a correlation between age and the outcome of that inquiry, but that is nowhere near the same as the assertion that benefits are granted or denied "because of ... age."

B. Under this Court's Precedents, the EEOC Cannot Establish a Prima Facie Case of Age Discrimination with Such an Imperfect Correlation Between Age and Benefits.

This Court's age discrimination precedents confirm that Kentucky's retirement statute does not differentiate "because of ... age." *See infra* Point I.B.1. And this Court's Title VII cases reinforce the conclusion. *See infra* Point I.B.2.

1. This Court's age discrimination cases confirm that the EEOC has not made out a prima facie case of discrimination.

Two ADEA cases provide the guideposts against which to measure Kentucky's statute. On one side of the line is *Hazen Paper*, 507 U.S. 604. There, an employer fired an employee because his retirement benefits were about to vest. *Id.* at 612. The employee asserted that firing on that basis constituted age discrimination. Obviously, there was a strong correlation between age and retirement vesting. *Id.* at 611. As this Court noted, "On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with the employer." *Id.*

Nevertheless, this Court rejected the claim—unanimously. The Court put the controlling legal principles simply and starkly: "[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609. The Court articulated the rule that applies, regardless of whether the policy is adopted formally or ad hoc: "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process *and had a determinative influence on the outcome.*" *Id.* at 610 (emphasis added). This Court held that the correlation with age was not enough to carry the day: "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a

decision based on years of service is necessarily 'age based.'" *Id.* at 611.

On the other side of the divide is *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). TWA had adopted a policy allowing captains who were disqualified from continuing as pilots to bid on positions as flight engineers. *Id.* at 116. The disqualified pilots could even "bump" less senior flight engineers. *Id.* at 116-17. But the policy had a big exception: Captains who were disqualified from continuing to fly because they were approaching age 60 were not allowed to bump less senior engineers. *Id.* at 118. If they could not land a spot as a flight engineer through the normal contract bidding process, they had to retire at age 60. *Id.* The rules treated a captain who was disqualified from flying because he was incompetent better than a captain with an impeccable flying record who was disqualified solely because he was turning 60.

This Court found the policy facially discriminatory because the terms governing whether a captain could bump a flight engineer depended solely on the captain's age. *Id.* at 120-21. The discrimination exhibited what this Court later described as "the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper*, 507 U.S. at 610.

Kentucky's retirement statute falls on the *Hazen Paper* side of the line. As in *Hazen Paper*, but unlike in *Thurston*, "the factor motivating the employer is some feature other than the employee's

age." *Id.* at 609. In fact, this case involves a flip side of the same decisive factor—eligibility to retire. In *Hazen Paper*, the distinguishing feature was that the employee was about to become eligible to retire, whereas here, the distinguishing feature is whether an employee is already eligible to retire. Either way, organizing a plan around eligibility for retirement is not the same as organizing a plan around age—and it is certainly more laudable than organizing a policy around the goal of cheating employees out of their pension benefits entirely. Here, as in *Hazen Paper*, "the employee's protected trait" did not have "a *determinative* influence on the outcome," for, as we have shown, there are numerous circumstances where age is irrelevant and many where younger employees fair better. *Id.* at 610 (emphasis added). Here, as there, age is "analytically distinct" from the decisive factor. *Id.* at 611.[4]

Unlike in *Thurston*, nothing about Kentucky's retirement statute so much as suggests a view that "the employer believes that productivity and competence decline with old age," or any other "inaccurate and stigmatizing stereotypes." *Id.* at 610. As Chief Judge Boggs aptly put it, this sort of stereotyping "is nowhere found in the plan under consideration today." J.A. 86.

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[4] *Hazen Paper* did "not consider the special case where an employee is about to vest in pension benefits as a result of his *age*, rather than years of service, and the employer fires the employee in order to prevent vesting." *Id.* at 613 (emphasis in original). But, for reasons explained later, that distinction does not change the result. *See infra* at 32-41 (Point I.C.).

In the end, this Court's ultimate conclusion in *Hazen Paper* applies with equal force here: "The prohibited stereotype ('Older employees are likely to be— ') would not have figured in this decision, and the attendant stigma would not ensue," under Kentucky's retirement statute. 507 U.S. at 612. Just as in *Hazen*, any "decision" to deny benefits "would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee," and his relationship to retirement eligibility. *Id.* There, the employer accurately concluded "that [the employee] indeed is 'close to vesting,'" *id.*; here Kentucky accurately discerns that the employee has, indeed, become eligible to retire.

2. This Court's other discrimination cases support the same conclusion.

As this Court has noted, discrimination cases arising under Title VII can be instructive. *See Smith v. City of Jackson*, 544 U.S. 228, 233 & n.4 (2005). For reasons that will be explained fully below, Congress recognized that there are differences between age and other protected characteristics, and those differences can translate into doctrinal differences. *See infra* at 42-45. Even overlooking those differences, for the time being, the Title VII discrimination cases fully support the conclusion that the Kentucky retirement statutes do not discriminate "because of ... age."

The gender and race discrimination cases draw the same line that this Court's ADEA cases reveal. On one side of the divide are policies—like the one at issue in *Thurston*—that discriminate "because

of" the protected characteristic. Thus, for example, in a pair of Title VII cases, this Court has disapproved of retirement provisions that treated women differently from men. One required women to pay higher contributions than men. See *L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 705 (1978). The other offered lower annuities to women than to men even though they had made the same contributions. *See Ariz. Governing Cmte. for Tax-Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1074 (1983). Under both plans, women were treated differently specifically because they were women. No woman could ever receive the same retirement treatment as a similarly situated man, much less more favorable treatment. In each case, the employer offered the justification that women tend to outlive men. *See Norris*, 463 U.S. at 1083; *Manhart*, 435 U.S. at 704. This Court rejected these justifications as based on the very sort of stereotypes that are impermissible. *See Norris*, 463 U.S. at 1083; *Manhart*, 435 U.S. at 707.

Similarly, this Court struck an employment policy in which women of reproductive age were expressly barred from favorable assignment in a factory because of environmental hazards deemed harmful to unborn children. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 198-99 (1991). Male employees of reproductive age were also at risk for passing along the same genetic damage as a result of the same environmental factors. *Id.* at 198. Nevertheless, the employer's policy barred only women—solely because of their gender—from the more desirable and lucrative assignment. *Id.* This Court found

the policy discriminatory because the protected trait—and only the protected trait—motivated the employer's policy.

On the other side of the divide are circumstances—as in *Hazen Paper*—where there might be a *correlation* between the inferior treatment and the protected classification, but the differential treatment is not "because of" the protected classification. Especially noteworthy in this regard is *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The employer there provided disability benefits to all employees who were disabled. *Id.* at 128. But if a woman was disabled due to pregnancy, she could not collect disability benefits. *Id.* at 129. Under the plan, "pregnancy affords the only disability, sex-specific or otherwise, that [wa]s excluded from coverage." *Id.* at 152 (Brennan, J., dissenting). Several women brought *gender* discrimination claims under Title VII. [5]

This Court held that "exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136. The Court drew heavily from a case reaching the same conclusion with regard to a similar statutory exclusion that was alleged to constitute gender discrimination in violation of the Equal Protection Clause. *See Geduldig v. Aiello*, 417 U.S. 484, 494-95 (1974). Quoting liberally from that case, the Court acknowledged that "'it is

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[5] At the time, Congress had not yet prohibited discrimination on the basis of pregnancy. *See* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

true that only women can become pregnant,'" but "it does not follow that every ... classification concerning pregnancy is a sex-based classification." 429 U.S. at 134 (quoting *Geduldig*, 417 U.S. at 496). Critical to the Court's holding was the conclusion that there is a "'lack of identity between the excluded disability and gender as such.'" *Id.* at 135 (quoting *Geduldig*, 417 U.S. at 496 n.20). This Court explained:

> "'The program divides potential recipients into two groups—pregnant *women* and nonpregnant *persons*. While the first group is exclusively female, the second includes members of both sexes.'"

Id. (quoting *Geduldig*, 417 U.S. at 496 n.20) (emphasis added).

This case falls on the *Gilbert* side of the discrimination dividing line for the same reason that it falls on the *Hazen* side of the ADEA dividing line: Both the operative rule for eligibility and the underlying motivation are not about status in the protected class or stereotypes rooted in that status.

Gilbert is especially on point, because the parallels to this case are so stark. There, as here, the challenge boiled down to an employer's decision to offer "an insurance package, which covers some risks, but excludes others." *Id.* at 138. In *Gilbert*, the employer chose to exclude from coverage one sort of disability (pregnancy-related disability); here the employer opted to exclude from coverage those who already have a retirement safety net. But just as "gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-

inclusive," *id.* at 138-39, so, too, here, age-based discrimination does not result just because Kentucky's disability retirement benefits do not include every disabled employee, whether or not eligible for retirement.

In fact, this Court's analysis in *Gilbert* applies with even greater force here. In *Gilbert*, women were the only ones who would ever be excluded from disability coverage. But here, as has been demonstrated, the operative rule (distinguishing based on retirement eligibility) excludes employees outside the protected class (younger employees, who have crossed the 20-year threshold) just as it excludes those who are in the protected class (older employees who have crossed the threshold of 55 with five years of service).

C. The Analysis Does Not Change Just Because Age Can Be a Factor in Determining Retirement Eligibility.

Even though Kentucky's retirement statute does not categorically treat older employees worse than younger ones, and despite the above precedents, the Court of Appeals held that Kentucky's retirement statute discriminates on its face. In so holding, the Court of Appeals placed dispositive weight on the fact that Kentucky's retirement statute sometimes considers age as a factor in determining *eligibility for normal retirement*, which, in turn, is the central organizing feature of the challenged provisions governing benefits for disabled employees. The Court of Appeals misapprehended the relationship between age and disability retirement under Kentucky's statute. *See infra* Point I.C.1. The Court of Appeals also incorrectly read *Public Employees*

Retirement System v. Betts, 492 U.S. 158 (1989), as support for its conclusion. *See infra* Point I.C.2.

1. The Court of Appeals' analysis of the factor of age was flawed.

The Court of Appeals did not question two propositions that should dictate the outcome of this case. The first is that it is permissible to base retirement eligibility on age. The second is that it is permissible to provide disability benefits only to employees who are not yet eligible to retire, and to calculate disability payments based upon how far an employee is from retirement eligibility. Thus, for example, neither the EEOC nor the Court of Appeals would have any trouble with conditioning disability benefits (or calculating them) based upon how far an employee is from reaching a retirement eligibility milestone of, say, 20 years of service. The Kentucky retirement statute does that. But since eligibility can also depend upon age (with a minimum service requirement), the Kentucky retirement statute also combines the two propositions, effectively conditioning disability benefits (and calculating them) on the basis of that eligibility milestone as well. The Court of Appeals never grappled with why it would be permissible to condition benefits on one eligibility milestone but not the other, when both milestones are equally legal.

The basic analytical flaw. The Court of Appeals' analysis boiled down to a simplistic theorem:

1. When benefits to a disabled worker are based on eligibility, and eligibility can be based on age, age might determine a benefits outcome.

2. A statute is facially discriminatory if age determines any outcome.

3. Thus, the Kentucky retirement statute is facially discriminatory.

The theorem has a certain superficial attractiveness as a general principle of discrimination law. It would almost certainly hold true if the word "age" were replaced with "gender" or "race." But on closer inspection, that is because the first postulate of the theorem would always be a nonstarter in those circumstances: An employer could never set eligibility criteria for a retirement plan based on gender or race. Kentucky's retirement statute would violate Title VII if it set an eligibility criterion, for example, of "female with five years of service."

The theorem breaks down in the context of age, however, precisely because it *is* permissible to let age dictate eligibility for retirement. Thus, it should not be considered facially discriminatory to let age become a factor in benefits that depend on eligibility for retirement.

To hold otherwise would yield a perverse result. An older employee—say, one who begins working at age 45 or 50—could derive enormous benefit from a plan that allows him to retire with undiminished benefits at age 55 (without coming close to serving 20 years). Yet, the employee could then insist that, for purposes of calculating other retirement-related benefits, the employer must ignore his age and treat him as if he had always been subject only to the 20-year milestone. That is the point the Court of Appeals elides throughout its analysis both on eligibility for disability

retirement and on the calculation of benefits.

Eligibility. As to eligibility, the Court of Appeals' analysis is captured in the following passage:

> In order to be eligible for disability retirement benefits, employees ... must become disabled before they reach age fifty-five... [W]hen such an employee becomes disabled at age fifty-five or older, that older employee is adversely treated because of his or her age when compared to a disabled coworker who is similarly situated in all relevant respects other than age.

J.A. 73-74. This passage exhibits three analytical flaws.

First, the Court of Appeals has turned the whole retirement statute upside down. Employees do not become "eligible for disability retirement benefits" by "becom[ing] disabled before they reach age fifty-five." As is explained above, the statute is designed to allow an employee who becomes disabled *before reaching* retirement eligibility a way nevertheless to become eligible for *retirement* benefits. So, "when such an employee becomes disabled at age fifty-five or older," it is completely incorrect to say that "that older employee is adversely treated ... compared to a disabled coworker who" has not yet reached retirement eligibility. That is like a person who is gainfully employed complaining that welfare discriminates against him, because he is "adversely treated" compared to one who is on the dole.

The second flaw is the converse of the first: It is equally convoluted to condemn disability

retirement as a program that treats "similarly situated" employees differently. With regard to eligibility for normal retirement, a disabled employee who has not reached retirement eligibility is not "similarly situated" to one who has. The latter would get retirement benefits, with or without the disability. The former would not—but for Kentucky's decision to provide the safety net of disability retirement. The provisions that are being challenged here, then, are responsible for allowing disabled employees who have not reached another retirement milestone to be similarly situated to those who have.

Third, the Court of Appeals has isolated age as if it were the only factor in play. Even if the first sentence of the above-quoted passage were otherwise accurate, it would be horribly incomplete. A more complete (though still inapt) rendition of the proposition would include the following italicized language: "In order to be eligible for disability retirement benefits, employees ... must *either [1]* become disabled before they reach age fifty-five *or [2] become disabled before serving 20 years.*" There is a difference, for the more complete rendition makes it clear that age matters only because it is a critical component of an eligibility milestone, and not because Kentucky discriminates against older employees.

The difference is especially stark when we consider what conclusion the Court of Appeals' logic would yield if it focused on service retirement rather than the age factor. The proposition would be:

> When such an employee becomes disabled *after working 20 years*, that *more senior* employee is adversely treated because of his or her *experience* when compared to a disabled coworker who is similarly situated in all relevant respects other than *years of service*.

Just as it would be odd to say that a "senior employee is adversely treated *because of* his or her *experience*," it is equally nonsensical to say here that an "older employee is adversely treated *because of* his or her *age*."

Benefits calculation. Similar flaws infect the Court of Appeals' conclusion that the Kentucky retirement statute "is facially discriminatory in a second way, in that [Kentucky] employees who become disabled when they are still 'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." J.A. 74.

First, the two are not "similarly situated." A 20-year-old rookie police officer who gets shot on the first day on the job is not situated the same as he would be if he had gotten shot on his twentieth anniversary. Similarly, if Mr. Lickteig had become disabled on his first day on the job, when he was 44, he would not have been in the same boat as he was when he became disabled after accruing almost 18 years of retirement credit, at age 61. When the statute gives more of a boost to disabled employees who have fewer years of service under their belt, it is because those employees typically need more of a boost. The same is likely true of employees who are otherwise further from attaining normal retirement eligibility. The premise of the statute is

that, as a general rule, the less time you've had to work, the less opportunity you've had to build your financial security. That premise may not reward the less frugal or diligent, but it does not "discriminate ... because of ... age."

Second, once again, the statement is incomplete. To fully capture what the statute does, the Court of Appeals should have added that "employees who become disabled when they are still '*junior* enough' to be eligible for disability-retirement benefits *based on the 20-year milestone* receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their *seniority*." Again, the more complete statement underscores that any difference in treatment is based upon how far away the disability milestone is, not on age per se.

Third, regardless of which eligibility milestone is used, the point of the imputed service feature for disabled employees is to treat the member as if he had more years than he actually worked. The sole purpose is to get the member to a normal retirement milestone in the shortest time possible. The imputed service "fills the gap" created by a disabling event that cut the employee's working life short. The Court of Appeals wrongly concluded that an employee is awarded the enhanced benefit "for no reason other than ... age." J.A. 74. That is not true. The employee who is further away from retirement receives a larger benefit because he is facing a longer gap and needs a bigger safety net to fill it. The design favors the worker who needs the most time to reach normal retirement, as that is the person with the biggest need for a safety net. Sometimes that worker is younger and sometimes

older. Sometimes the gap is filled most quickly by age plus service; sometimes by service alone; but, it is never age qua age that determines the outcome.

2. The Court of Appeals misread this Court's holding in *Betts*.

The Court of Appeals incorrectly believed that this Court's opinion in *Public Employees Retirement System v. Betts*, 492 U.S. 158—coupled with a statute overruling it—supports its conclusion that the Kentucky retirement statute impermissibly considers age. J.A. 75-77.

In *Betts*, this Court addressed an age discrimination claim against a different retirement plan. The focus of the opinion was not on the validity of the plan, but on a statutory provision that exempts from ADEA coverage age-based decisions taken "to observe the terms of ... any bona fide employee benefit plan such a retirement, pension or insurance plan, *which is not a subterfuge* to evade the purposes of" the ADEA. 29 U.S.C. § 623(f)(2) (1988) (emphasis added). The Court indicated that any plan that predated the ADEA, was likely not "a subterfuge to evade" the ADEA. 492 U.S. at 168. The practical result was that a retirement, pension, or insurance plan that used age in a blatantly discriminatory way could not be found to violate the ADEA. Congress passed the Older Workers Benefit Protection Act (OWBPA) to remove the "subterfuge" language, so that preexisting employee benefits plans would also be subjected to ADEA strictures. Pub. L. 101-433, § 101, 104 Stat. 978, 978 (1990).

From this course of events, the Court of Appeals drew three inferences: (1) "that the

Supreme Court found" the plan under review in *Betts* "to be facially discriminatory," J.A. 75; (2) that "Congress intended to prohibit the very sort of age-based discrimination" that was involved in *Betts*, J.A. 75-76; and (3) that the Kentucky retirement statute "closely resembles the characteristic of the plan in *Betts*," J.A. 75. If the Court of Appeals was wrong about any of these propositions, then its ultimate conclusion—that "Congress intended to prohibit the very sort of age-based discrimination" that is on display "in this plan"—fails. J.A. 76. The Court of Appeals was wrong on all three.

First, this Court did not address whether the plan before it in *Betts* was facially discriminatory; it did not need to because the Court's conclusion about the broad scope of the "subterfuge" language obviated any such inquiry. *See* 492 U.S. at 161 ("In the case before us, we must consider the meaning and scope of the [OWBPA] exemption."). All the Court did was to note that "on its face, the ... scheme renders covered employees ineligible for disability retirement once they have attained age 60." *Id.* at 166. That was a predicate to the Court's conclusion that the denial of disability benefits to the claimant fell within the terms of the exemption, because it "therefore qualifies as an action 'to observe the terms of' the plan." *Id.* It was not even close to a holding that the statute is "facially discriminatory."

Second, in enacting the OWBPA, Congress was focused on eliminating the blanket immunity for older retirement plans. It wanted to be sure plans, like the one before the Court in *Betts*, would not be impervious to ADEA scrutiny. Congress was not

fixated on making sure that the specific plan at issue in *Betts* could never survive an ADEA challenge.

Third, while there are superficial similarities between the plan in *Betts* and Kentucky's retirement statute, the two differ in one very important respect. To begin with the similarities, like Kentucky's retirement statute, the plan in *Betts* prescribed two routes to retirement eligibility: (1) serving a number of years (regardless of age); and (2) reaching a certain age (for the plaintiff there, 60) plus a smaller number of years of service. *Id.* at 162. In addition, the plan provided a separate disability plan for employees who became disabled after working a prescribed number of years. *Id.* But, as Chief Judge Boggs noted in the dissent below, J.A. 92, unlike in Kentucky, the disability benefits in *Betts* were not conditioned on eligibility for retirement; they were conditioned expressly on age qua age. Only employees who had worked five years and were under 60 could receive benefits. *Betts*, 492 U.S. at 162. An employee who was over 60 never could get disability benefits, even though employees who were eligible to retire through the other route (length of service, alone) still could receive disability benefits.

* * *

In sum, neither law nor logic supports the Court of Appeals' conclusion that the Kentucky retirement statute differentiates "because of ... age." For that reason, alone, the judgment must be reversed.

II. THE EEOC HAS NOT ESTABLISHED A PRIMA FACIE CASE BECAUSE KENTUCKY'S DISABILITY RETIREMENT STATUTE DOES NOT "DISCRIMINATE," IN THAT ITS REFERENCE TO AGE IS NOT ARBITRARY.

There is a second, and independent, reason that the EEOC has not established a prima facie case of age discrimination: Even if the disability provisions of the Kentucky retirement statute could be said technically to differentiate employees "because of ... age," the difference does not amount to "*discriminat[ion]*"—not, at least, without some evidence of animus or inaccurate age-based stereotyping. In a disparate treatment case, "[p]roof of discriminatory motive is critical." *Hazen Paper*, 507 U.S. at 609.

The ADEA was directed only at "arbitrary" discrimination—discrimination motivated by inaccurate stereotypes. *See infra* Point II.A. Contrary to the Court of Appeals' view, the EEOC could not establish a prima facie case just by pointing to the statute itself, unless the arbitrariness appears on the face of the statute. *See infra* Point II.B. Because Kentucky's retirement statute is not arbitrary—i.e., not based on inaccurate ageist stereotypes—the EEOC failed to establish a prima facie case of age discrimination. *See infra* Point II.C.

A. The ADEA Targets Only "Arbitrary" Age Discrimination, Defined as Discrimination Based on Inaccurate Stereotypes.

In passing the ADEA, Congress declared that it

did not intend to prohibit all differentiations on the basis of age. It was concerned only with "the setting of *arbitrary* age limits regardless of potential for job performance." 29 U.S.C. § 621(a)(2) (emphasis added); *id.* § 621(a)(4) ("arbitrary discrimination in employment because of age ... burdens commerce"). Accordingly, Congress announced that the ADEA's "purpose" was only to "prohibit *arbitrary* age discrimination in employment." *Id.* § 621(b) (emphasis added).

As this Court has repeatedly recognized, that was because Congress concluded that age discrimination is different from other types of discrimination: It was "aware that there were legitimate reasons as well as invidious ones for making employment decisions on age." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004). That was why, initially, "Congress chose not to include age within discrimination forbidden by Title VII of the Civil Rights Act of 1964." *Id.* at 586. "Instead it called for a study of the issue by the Secretary of Labor, who concluded that age discrimination was a serious problem, but one *different in kind* from discrimination on account of race." *Id.* at 587 (citation omitted; emphasis added); *see* Rep. of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 2 (1965) (hereinafter Wirtz Report). Specifically, Labor Secretary W. Willard Wirtz observed that "[e]mployment discrimination because of race is identified ... with feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned." Wirtz Report at 2 (emphasis in original), *quoted in Gen. Dynamics*,

540 U.S. at 587 n.2. Instead, older workers face a different "kind of discrimination," one that "involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" *Id.* (emphasis in original). Secretary Wirtz referred to these sorts of stereotype-based distinctions as "'arbitrary' discrimination." *Smith*, 544 U.S. at 232 (quoting Wirtz Report at 22). Secretary Wirtz's notion that Congress needed to address only "arbitrary" age discrimination—i.e., discrimination based upon ageist stereotypes—formed the foundation for the ADEA, whose "statements of purpose and findings ... mirror the Wirtz Report." *Gen. Dynamics*, 540 U.S. at 589.

In keeping with these origins and the stated congressional purpose, this Court has repeatedly observed that the ADEA targets only "*arbitrary* and stereotypical employment distinctions." *Id.* at 587 (emphasis added); *Thurston*, 469 U.S. at 120 ("'The ADEA 'broadly prohibits arbitrary discrimination ... based on age.'" (quoting *Lorillard v. Pons*, 434 U.S. 575, 577 (1978))). As this Court has emphasized, the ADEA targets "inaccurate and stigmatizing stereotypes"—situations where an "employer ... rel[ies] on age as a proxy for an employee's remaining characteristics, such as productivity." *Hazen Paper*, 507 U.S. at 611. In short, the ADEA is directed at the sorts of arbitrary age discrimination in which an employer says or thinks, "Older employees are likely to be— ...." *Id.* at 612; *see generally Smith*, 544 U.S. at 254-56 (O'Connor, J., concurring) (cataloging the evidence that Congress targeted only "arbitrary discrimination"). Thus, when a differentiation

based upon age is not based on an inaccurate stereotype—and, therefore, is not arbitrary in the relevant sense, then it is not even accurate to call it "discriminat[ory]." *See Gilbert*, 429 U.S. at 145 ("When Congress makes it unlawful for an employer to 'discriminate ... because of ... sex ... ,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.").

B. The EEOC Cannot Establish that the Kentucky Statute Is Facially Discriminatory Without Demonstrating that It Is Arbitrary on Its Face.

The Court of Appeals ignored both the origins of the ADEA and the ways in which age discrimination is different from other sorts of discrimination when it concluded that the EEOC had no obligation to demonstrate that the Kentucky retirement statute was arbitrary—i.e., motivated by stereotype or animus. J.A. 77-81. The Court of Appeals' reasoning was as follows: "Once a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee 'because of' the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself." J.A. 78.

The flaw in this reasoning is that it incorrectly assumes that all age-related differences in treatment are per se "discriminatory," and that the very presence of an age differentiation in a policy, alone, is always "proof of discriminatory intent."

To be sure, the improper motive "'can *in some situations* be inferred from the mere fact of differences in treatment.'" *Hazen*, 507 U.S. at 609 (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)) (emphasis added). Certainly, where the arbitrariness—the ageist stereotype—screams out from the face of the policy, it is perfectly appropriate to draw the inference without demanding further proof of improper motive. That was what this Court did in *Thurston*, where TWA had one rule for pilots who disqualified from flying because they were pushing 60 and another for pilots who were disqualified for any other reason, including sheer incompetence. 469 U.S. at 121; *see supra* at 25-26. There could be no question but that this rule, on its face, was arbitrary, in the sense in which the ADEA uses the word.

But as this Court seems to have acknowledged when it observed that courts may draw an inference of intent to discriminate "in some situations," *Hazen*, 507 U.S. at 609, the inference cannot be applied to every situation where a policy draws distinctions based on age. Where, for example, on the face of a plan, there is not the slightest hint of the sort of arbitrariness that motivated Congress to pass the ADEA, the plan cannot be struck as facially discriminatory; the EEOC must adduce some evidence that the differentiation is based on inaccurate stereotypes.

In this respect, the rules governing how and when it is permissible to draw such definitive inferences of discriminatory intent in an age discrimination case differ from the rules governing such inferences in cases involving explicit classification on the basis of race or gender. *See,*

e.g., *Johnson Controls*, 499 U.S. at 199 (no further evidence of arbitrariness or animus required once a differentiation based on gender appears on the face of a policy). It makes perfect sense to draw different inferences, for "age discrimination [is] a ... problem" that is "different in kind from discrimination on account of race." *Gen. Dynamics*, 540 U.S. at 587.

The differences do not disappear just because ADEA's substantive prohibition was cribbed from Title VII. *See Lorillard*, 434 U.S. at 584. There are times when it makes sense to "presume that Congress intended that text to have the same meaning in both statutes." *Smith*, 544 U.S. at 233 (plurality). But this Court has held that it is improper to import principles from Title VII to the ADEA when doing so would yield results that are inconsistent with the ADEA's origins and overarching purpose.

That is exactly what this Court did in *General Dynamics*, holding that the very same provision of the ADEA must be "read more narrowly than analogous provisions dealing with race or sex." *Gen. Dynamics*, 540 U.S. at 597-98. Specifically, when Title VII makes it impermissible for an employer to "discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), it allows for a "reverse discrimination" cause of action, for example, by a white employee or a male who claims to have been discriminated against on the basis of his "race" or "sex." *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (discrimination because of race is "not limited to discrimination against members of any

particular race"). Notwithstanding the identical language, when the ADEA makes it impermissible to "discriminate against any individual ... because of such individual's age," no such reverse-discrimination claim can be brought. *Gen. Dynamics*, 540 U.S. at 601. In distinguishing the ADEA from Title VII, this Court relied on the background recited above—the Wirtz Report's observations about the difference between age discrimination and other sorts of discrimination. *Id.* at 587-95. This Court concluded that it would undermine "the statute's manifest purpose" to read the ADEA the same as identical language in Title VII. *Id.* at 594.

The same background and the same principles should yield the same result here. Even though classifications on the basis of gender or race are routinely viewed as facially discriminatory without any further reflection about the underlying motive, that leap cannot be taken in the context of age discrimination unless the arbitrariness, and not just the differentiation, appears on the face of the policy.

C. The Kentucky Retirement Statute's Consideration of Age Is Not Arbitrary or Based on an Inaccurate Stereotype.

Kentucky's retirement statute is a rational accommodation for disabled employees who would not otherwise be eligible for retirement, and not an arbitrary stereotype of older employees. Kentucky's statute does not even arguably exhibit the sorts of evils Congress was targeting when it enacted the ADEA. Nothing in the structure or words of the statute—and nothing in the evidence presented—so much as hints at the sort of

"inaccurate and stigmatizing stereotypes" Congress wished to attack. *Hazen Paper*, 507 U.S. at 611. All indications are to the contrary.

First, as is demonstrated above, the eligibility for, and amount of, disability retirement benefits is organized around eligibility for retirement, not around age. *See supra* at 6-11, 21-24.

Second, it is perfectly legal to base retirement eligibility on age, and it is legal to base eligibility for disability benefits on whether an employee already has a retirement safety net. So it cannot be arbitrary—or discriminatory—to allow age to play a role in the determination of eligibility for disability benefits.

Third, the Kentucky retirement statute's correlation between eligibility for retirement and *in*eligibility for disability benefits is a ubiquitous feature of benefits law. Private insurers routinely adopt exactly that structure: The insurer sells a disability policy with a set term; coverage ends the moment the employee reaches eligibility for retirement.

Even Congress, itself, prescribed exactly that structure in the Social Security Act. The moment a worker becomes eligible for federal old-age benefits upon attaining age 62, the worker is no longer eligible for Social Security disability benefits. *See* 42 U.S.C. §§ 416(i)(2)(D), 423(a)(1)(B). It cannot be arbitrary or discriminatory when states or private entities adopt exactly the same structure that the federal government did for the single largest disability policy in the country. To hold that the ADEA so declares "would introduce unwelcome discord into

the federal statutes on employee benefit plans." *Gen. Dynamics*, 540 U.S. at 597 n.9 (noting "unwelcome discord" that the ADEA would introduce if it were to be interpreted to prohibit discrimination against the young).

Fourth, the precise sort of policy at issue in this case is ubiquitous. States and local governments across the country have routinely adopted policies where eligibility for age-based retirement and for disability benefits are complementary. They consider these policies to be the best way to attract and retain superior employees of all ages. When Congress enacted comprehensive pension legislation in the form of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, it excluded state and local governments from coverage based on federalism concerns. Congress assured states that they were free to design the nearly 2700 public employee retirement plans covering 23 million American workers. Nothing in the history or language of the ADEA suggests that Congress intended to wreak havoc with so many plans by tarring significant numbers of them as arbitrary or improperly motivated by impermissible stereotypes.

Fifth, for reasons described earlier, Kentucky's retirement statute is extraordinarily favorable to older workers. *See supra* at 5. If Kentucky were to eliminate the eligibility milestone that has created all the mischief in this case—the one allowing for retirement at age 55 with five years of service—older workers would be far worse off. A plan in which no one gets retirement benefits unless they work 20 years, or 30 years, is of little value to older workers. Older workers will shun an employer that

offers them so little by way of longer-term security—especially if the employer is trying to recruit them to hazardous jobs.

Therein lies the ultimate irony of this case. Chief Judge Boggs was correct when he observed that Kentucky finds itself sued precisely because it derived a retirement plan that was especially attractive to older workers. J.A. 97. The retirement statute's design enables an employee like Mr. Lickteig who moves into a public sector job later in life to achieve a guaranteed retirement benefit in only five years. If, as the Court of Appeals suggests, service alone is the only lawful measure of eligibility for disability policies that correlate with retirement policies, the result would be a policy that creates a barrier to employment for older workers in place of the current design which encourages and enables entry into the work force at any age with the ability to earn meaningful pension benefits. This would give rise to exactly the circumstances the ADEA was designed to prevent: policies that keep older workers from getting or keeping employment. So, as Chief Judge Boggs observed, Kentucky's "very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated [the] 'problem'" the EEOC set out to cure. *Id.* (citation omitted). In truth, the "problem" is the EEOC's theory, not Kentucky's generous retirement plan.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

29 U.S.C. § 621 provides:

Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623(a) provides:

Prohibition of age discrimination

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age.

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Relevant sections of the 1998 edition of the Kentucky Revised Statutes provide:

16.505 DEFINITIONS FOR KRS 16.510 TO 16.652

* * *

(15) "Normal retirement date" means the first day of the month following a member's fifty-fifth birthday, except that for members over age fifty-five (55) on July 1, 1958, it shall mean January 1, 1959. A member of the State Police Retirement System, a member of the County Employees Retirement System or a member of the Kentucky Employees Retirement System covered by this section with twenty (20) or more years of service credit, at least fifteen (15) of which are current may declare his "normal retirement date" to be some date prior to his fifty-fifth birthday; ....

16.545 CONTRIBUTIONS OF MEMBERS; PICKED-UP EMPLOYEE CONTRIBUTIONS

(1) Except for members over age fifty-five (55) on July 1, 1958, who shall not be required to contribute, each member shall, commencing on July 1, 1968, contribute for each pay period for which he receives compensation, seven percent (7%) of his creditable compensation.

(2) The employer shall cause to be deducted from the compensation of each member for each and every payroll period subsequent to July 1, 1958, the contributions payable by such member as provided in KRS 16.510 to 16.652

(3) Every member shall be deemed to consent to deductions made as provided herein; and the payment of salary or compensation less such deduction shall be a full and complete discharge of all claims for services rendered by such person during the period covered by such payment, except as to any benefits provided by KRS 16.510 to 16.652.

(4) Each employer shall, solely for the purpose of compliance with Section 414(h) of the United States Internal Revenue Code, pick up the employee contributions required by this section for all compensation earned after August 1, 1982, and the contributions so picked up shall be treated as employer contributions in determining tax treatment under the United States Internal Revenue Code and KRS 141.010(10). These contributions shall not be included as gross income of the employee until such time as the contributions are distributed or made available to

the employee. The picked-up employee contribution shall satisfy all obligations to the retirement system satisfied prior to August 1, 1982, by the employee contribution, and the picked-up employee contribution shall be in lieu of an employee contribution. Each employer shall pay these picked-up employee contributions from the same source of funds which is used to pay earnings to the employee. The employee shall have no option to receive the contributed amounts directly instead of having them paid by the employer to the system. Employee contributions picked up after August 1, 1982, shall be treated for all purposes of KRS 16.510 to 16.652 in the same manner and to the same extent as employee contributions made prior to August 1, 1982.

16.565 RETIREMENT ALLOWANCE ACCOUNT

The retirement allowance account shall be the account in which shall be accumulated all employer contributions, amounts transferred from the member contribution account, and to which all income from the investment assets of the system shall be credited. From this account there shall be paid administrative expenses and in addition all benefits payable under KRS 16.510 to 16.652. There shall be transferred from this account to the member contribution account the interest credited annually to each member's individual accounts.

16.576 NORMAL RETIREMENT

(1) Any member with at least five (5) years of service credit may retire at his normal retirement date, or subsequent thereto, upon written notification to the system, setting forth at what

time the retirement is to become effective, if the effective date shall be after his last day of service and subsequent to the filing of the notice at the retirement office.

(2) The member shall have the right to elect to have his retirement allowance payable under subsection (3), (4), or (6) of this section or any one (1) of the plans set forth in KRS 61.635.

(3) Effective August 1, 1990, a member of the Kentucky State Police Retirement System may elect to receive an annual retirement allowance, payable monthly during his lifetime, equal to two and five-tenths percent (2.5%) of final compensation for each year of service credit. Effective August 1, 1988, a member of the County Employees Retirement System covered by this section may elect to receive an annual retirement allowance, payable monthly during his lifetime, equal to two and five-tenths percent (2.5%) of final compensation for each year of service credit. Effective August 1, 1988, a member of the Kentucky Employees Retirement System covered by this section may elect to receive an annual retirement allowance, payable monthly during his lifetime, equal to two and forty-nine hundredths percent (2.49%) of final compensation for each year of service credit. The annual retirement allowance for a member covered by this section shall not exceed the maximum benefit as set forth in the Internal Revenue Code.

(4) The member may elect to receive a monthly retirement allowance payable for ten (10) years certain, actuarially equivalent to the retirement allowance payable under subsection (3) of this section. If the member should become deceased

prior to the expiration of ten (10) years, his beneficiary shall receive the remaining payments monthly for the duration of the ten (10) years. The provisions of KRS 61.702 notwithstanding, the member who retired on June 17, 1978, or thereafter, and his spouse and dependents or beneficiary shall continue to receive the insurance benefits to which they are entitled pursuant to KRS 61.702 after the expiration of ten (10) years. Effective with any insurance contract procured, or self-insurance plan instituted, after July 15, 1990, a member who retired prior to June 17, 1978, and his spouse and dependents or beneficiary shall receive insurance benefits pursuant to KRS 61.702 upon payment by the member or beneficiary of the entire cost of the required insurance premium.

(5) Notwithstanding any other provisions of this section, upon written notification to the system, a member shall have the option to defer his election to receive his retirement allowance. The retirement allowance payable under a deferred option shall be increased to reflect the deferred receipt of benefits.

(6) In lieu of any other benefits due under KRS 16.505 to 16.652, a member who has attained age fifty-five (55) and who has attained at least one (1) month of service credit but no more than fifty-nine (59) months of service credit may elect to receive an annual retirement allowance, payable monthly or less frequently as determined by the board, which shall be determined by multiplying his accumulated contributions by two (2) and converting this amount to an annual retirement allowance based on an annuity rate adopted by the board which would pay the actuarial equivalent of

twice his accumulated contributions over the lifetime of the retired member.

16.582 DISABILITY RETIREMENT

(1) (a) Total and permanent disability means a disability which results in the member's incapacity to engage in any occupation for remuneration or profit. Loss by severance of both hands at or above the wrists, or both feet at or above the ankles, or one (1) hand above the wrist and one (1) foot above the ankle, or the complete, irrevocable loss of the sight of both eyes shall be considered as total and permanent.

(b) Hazardous disability means a disability which results in the member's total incapacity to continue as a regular full-time officer or as an employee in a hazardous position, as defined in KRS 61.592, but which does not result in the member's total and permanent incapacity to engage in other occupations for remuneration or profit.

(c) In determining whether the disability meets the requirement of this section, any reasonable accommodation provided by the employer shall be considered.

(d) If the board determines that the total and permanent disability of a member receiving a retirement allowance under this section has ceased, then the board shall determine if the member has a hazardous disability.

(2) Any person may qualify to retire on disability, subject to the following:

(a) The person shall have sixty (60) months of service, twelve (12) of which shall be current

service credited under KRS 16.543(1), 61.543(1), or 78.615(1). The service requirement shall be waived if the disability is a total and permanent disability or a hazardous disability and is a direct result of an act in line of duty;

(b) The person shall be less than normal retirement age;

(c) The person's application shall be on file in the retirement office no later than twelve (12) months after the person's last day of paid employment as a regular full-time officer or in a regular full-time hazardous position;

(d) The person shall receive a satisfactory determination pursuant to KRS 61.665; and

* * *

(5) The disability retirement allowance shall be determined as provided in KRS 16.576, subject to the following:

(a) If the member's total service credit on his last day of paid employment in a regular full-time position is less than twenty (20) years, service shall be added beginning with his last date of paid employment and continuing to his fifty-fifth birthday. The maximum service credit added shall not exceed the total service the member had on his last day of paid employment, and the maximum service credit for calculating his retirement allowance, including his total service and service added under this section, shall not exceed twenty (20) years;

(b) If the member's total service credit on his last day of paid employment is twenty (20) or more years, then his total service credit shall be

used.

(6) If the member receives a satisfactory determination of total and permanent disability or hazardous disability pursuant to KRS 61.665 and the disability is the direct result of an act in line of duty, the member's retirement allowance shall be calculated as follows:

(a) For the disabled member, benefits as provided in subsection (5) of this section except that the monthly retirement allowance payable shall not be less than twenty-five percent (25%) of the member's monthly final rate of pay; and

(b) For each dependent child of the member on his disability retirement date, who is alive at the time any particular payment is due, a monthly payment equal to ten percent (10%) of the disabled member's monthly final rate of pay; however, total maximum dependent children's benefit shall not exceed forty percent (40%) of the member's monthly final rate of pay. The payments shall be payable to each dependent child, or to a legally-appointed guardian, or as directed by the system.

(7) No benefit provided in this section shall be reduced as a result of any change in the extent of disability of any retired member who is age fifty-five (55) or older.

(8) If a regular full-time officer or hazardous position member has been approved for benefits under a hazardous disability, the board shall, upon request of the member, permit the member to receive the hazardous disability allowance while accruing benefits in a nonhazardous position, subject to proper medical review of the nonhazardous position's job description by the

system's medical examiner.

(9) For a member of the State Police Retirement System, in lieu of the allowance provided in subsection (5) or (6) of this section, the member may be retained on the regular payroll and receive the compensation authorized by KRS 16.165, if he is qualified.

61.592 RETIREMENT OF PERSONS WORKING IN HAZARDOUS POSITIONS

(1) "Hazardous position" means any position whose principal duties involve active law enforcement, including the positions of probation and parole officer and Commonwealth detective, active fire suppression or prevention, or other positions, including, but not limited to, pilots of the Transportation Cabinet and paramedics and emergency medical technicians, with duties that require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning. Hazardous positions shall include positions in the Department of Corrections in state correctional institutions and the Kentucky Correctional Psychiatric Center with duties that regularly and routinely require face-to-face contact with inmates.

(2) Each employer may request of the board hazardous duty coverage for those positions as defined in subsection (1) of this section, but a county, narrowly defined as one (1) of Kentucky's one hundred and twenty (120) counties, the provisions of KRS 78.510(3) notwithstanding, shall request hazardous duty coverage for its full-time paid firefighters. Upon request, each employer shall certify to the system, in the manner

prescribed by the board, the names of all employees working in a hazardous position as defined in subsection (1) of this section for which coverage is requested. The certification of the employer shall bear the approval of the agent or agency responsible for the budget of the department or county indicating that the required employer contributions have been provided for in the budget of the employing department or county. The system shall determine whether the employees whose names have been certified by the employer are working in positions meeting the definition of a hazardous position as provided by subsection (1) of this section.

(3) (a) An employee determined by the system to be working in a hazardous position in accordance with subsection (2) of this section shall contribute, for each pay period for which he receives compensation, seven percent (7%) of his creditable compensation;

(b) Each employer shall pay employer contributions based on the creditable compensation of the employees determined by the system to be working in a hazardous position at the employer contribution rate as determined by the board. The rate shall be determined by actuarial methods consistent with the provisions of KRS 61.565;

(c) If the employer participated in the system prior to electing hazardous duty coverage, the employer may pay to the system the cost in order that the nonhazardous service be credited as hazardous service, or the employer may establish a payment schedule for payment of the cost of the hazardous service above that which would be

funded within the existing employer contribution rate. The employer may extend the payment schedule to a maximum of thirty (30) years. Payments made by the employer under this subsection shall be deposited to the retirement allowance account of the proper retirement system and these funds shall not be considered accumulated contributions of the individual members. If the employer elects not to make the additional payment, the employee may make the lump-sum payment in his own behalf or may pay by increments. Payments made by the employee under this subsection shall not be picked up, as described in KRS 61.560(4), by the employer. If neither the employer nor employee makes the payment, the service prior to hazardous coverage shall remain nonhazardous.

(4) The normal retirement age, retirement allowance, other benefits, eligibility requirements, rights, and responsibilities of a member in a hazardous position, as prescribed by subsections (1), (2), and (3) of this section, and the responsibilities, rights, and requirements of his employer shall be as prescribed for a member and employer participating in the State Police Retirement System as provided for by KRS 16.510 to 16.652.

(5) Any person employed in a hazardous position after July 1, 1972, shall be required to undergo a thorough medical examination by a licensed physician, and a copy of the medical report of the physician shall be retained on file by the employee's department or county and made available to the system upon request.

(6) If doubt exists regarding the benefits

payable to a hazardous position employee under this section, the board shall determine the benefits payable under KRS 61.515 to 61.705, or 78.520 to 78.852, or 16.510 to 16.652.

78.545 MATTERS NOT SPECIFIED IN KRS 78.510 TO 78.852

The following matters shall be administered in the same manner subject to the same limitations and requirements as provided for the Kentucky Employees Retirement System as follows:

* * *

(40) Disability procedure for members in hazardous positions as provided for in KRS 16.582.

78.520 RETIREMENT SYSTEM CREATED; FUND ESTABLISHED

There is hereby created and established:

(1) A retirement system for employees to be known as the "County Employees Retirement System" by and in which name it shall, pursuant to the provisions of KRS 78.510 to 78.852, transact all of its business and shall have the powers and privileges of a corporation; and

(2) A state fund, called the "County Employees Retirement Fund," which shall consist of all the assets of the system as set forth in KRS 78.510 to 78.852.

Kentucky Revised Statutes § 16.577 (2000) provides:

16.577 EARLY RETIREMENT

Upon retirement at early retirement date, a

member may receive an annual retirement allowance payable monthly during his lifetime which shall be determined in the same manner as for retirement at his normal retirement date, with years of service and final compensation being determined as of the date of his actual retirement, but the amount of the retirement allowance so determined shall be reduced to reflect the earlier commencement of benefits.

Kentucky Revised Statutes § 16.577(2) (2001) provides:

There shall be no reduction in the retirement allowance of a member who has twenty (20) or more years of service credit, at least fifteen (15) of which are current service.

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(11)

57pp No. 06-1037

In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether proof that an employee benefit plan on its face requires older workers to be denied disability benefits available to younger workers or to receive fewer disability benefits than younger workers establishes a prima facie case of discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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29 U.S.C. 623(a)(1) ..... *passim*
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29 U.S.C. 623(f)(2) (1988) 38, 41
29 U.S.C. 623(f)(2) 36, 39
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S. Rep. No. 263, 101st Cong., 2d Sess. (1990) ..... *passim*
United States Commission on Civil Rights Enforcement Effort, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971) 22
W. Willard Wirtz, Secretary of Labor, *The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (June 30, 1965) 33

In the Supreme Court of the United States

No. 06-1037

KENTUCKY RETIREMENT SYSTEMS, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

Respondent Equal Employment Opportunity Commission (EEOC) brought suit against petitioners Kentucky Retirement Systems (KRS), the Jefferson County Sheriff's Department, and the Commonwealth of Kentucky, alleging that the KRS disability retirement benefits plan discriminates on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, as amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978. The district court granted summary judgment to petitioners. J.A. 24-33. The court held that the EEOC had not established a prima facie case that the KRS plan discriminated on the basis of age on the ground that the EEOC had failed to show that the plan was "discriminatory, either facially or through disparate

treatment combined with intent." J.A. 29. The court of appeals affirmed. J.A. 36-54. The court of appeals then granted rehearing en banc and reversed the judgment of the district court, holding that the KRS plan facially discriminates on the basis of age, and that such facial discrimination in the terms of an employee benefit plan establishes a prima facie disparate treatment claim without additional proof of discriminatory animus against older workers. J.A. 56-97.

1. The ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual [age 40 or older] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1), 631(a). As amended by the OWBPA, the ADEA states that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 630(*l*). The OWBPA also amended the ADEA to provide that it "shall not be unlawful for an employer * * * to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i).

2. Under the KRS retirement plan, hazardous duty employees are eligible for unreduced normal retirement benefits at age 55 with five years of service, or after completing 20 years of service. J.A. 60 n.1; see Ky. Rev. Stat. Ann. §§ 16.505(15), 16.576(1), 16.577(2), 16.592(4) (LexisNexis 2003). The normal retirement benefit of a hazardous duty employee is generally calculated as 2.5% of the worker's final compensation multiplied by the number of years worked. *Id.* § 16.576(3); see J.A. 63. The KRS plan

does not cap or limit the length of service that will be used in calculating the amount of an individual's normal retirement benefit.[1] Thus, an employee may continue to work indefinitely beyond the date when he becomes eligible for an unreduced retirement benefit, accruing additional years of service that will increase his annual pension when he elects to retire.

The KRS plan also offers disability retirement benefits to certain hazardous duty workers. Ky. Rev. Stat. Ann. § 16.582 (LexisNexis Supp. 2007). In order to qualify for disability retirement benefits, a worker must "have sixty (60) months of service, twelve (12) of which shall be current service * * *. The service requirement shall be waived if the disability is a total and permanent disability or a hazardous disability and is a direct result of an act in line of duty." *Id.* § 16.582(2)(a). A hazardous duty worker is not eligible for disability retirement benefits if he is age 55 or older at the time he becomes disabled. *Id.* § 16.582(2)(b); see J.A. 39 & n.1, 61.

For disabled workers who are eligible for disability retirement benefits under Ky. Rev. Stat. Ann. § 16.582(2) (LexisNexis Supp. 2007), computation of those benefits is governed by Section 16.582(5). As in its calculation of a normal retirement benefit, KRS considers the final compensation of an individual hazardous duty worker, and uses the same 2.5% multiplier, when it calculates the amount of a disability retirement benefit. See *id.* §§ 16.576(3) 16.582(5). In calculating disability retirement benefits, however, KRS does not multiply those numbers by the

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[1] Under the KRS plan, the only limitation on the amount of an employee's normal retirement benefit is the "maximum benefit as set forth in the Internal Revenue Code." Ky. Rev. Stat. Ann. § 16.576(3) (LexisNexis 2003); *id.* § 61.595(1)(f) (2004).

employee's *actual* years of service. Rather, the statute provides that,

> *if the member's total service credit on his last day of paid employment in a regular full-time position is less than twenty (20) years, service shall be added beginning with his last date of paid employment and continuing to his fifty-fifth birthday.* The maximum service credit added shall not exceed the total service the member had on his last day of paid employment, and the maximum service credit for calculating his retirement allowance, including his total service and service added under this section, shall not exceed twenty (20) years.

Id. § 16.582(5)(a) (emphasis added); see J.A. 40 (explaining that KRS adds to the employee's actual years of service "the number of years remaining until the worker *would have* reached either normal retirement age or twenty years of service, but no more than the number of years already worked"); J.A. 40 n.2.[2]

Thus, if a 50-year-old hazardous duty worker with seven years of service becomes disabled, KRS will impute five additional years of service (the length of time remaining until the worker would have turned 55 and become eligible for normal retirement benefits on the basis of age) and will compute the employee's disability retirement benefits as

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[2] The KRS plan was amended in 2004, during the pendency of the EEOC's appeal from the grant of summary judgment in favor of petitioners. See J.A. 41 n.2, 65 n.2 (citing Ky. Rev. Stat. Ann. § 16.582(5)(b)). That amendment, which altered the calculation of disability benefits for employees newly hired on or after August 1, 2004, did not affect the benefits of any employee or retiree who was a KRS plan participant as of July 31, 2004. *Ibid.* The court of appeals did not address new Section 16.582(5)(b), see *ibid.*, and it is not at issue in this Court.

though the individual had served for 12 years. If a 50-year-old hazardous duty worker with 17 years of service becomes disabled, KRS will impute three additional years of service (the length of time remaining until the worker would have amassed 20 years of service and become eligible for normal retirement benefits on that ground) and will compute the disability retirement as though the individual had served for 20 years. A hazardous duty worker who becomes disabled *after* he has reached age 55, by contrast, is ineligible for disability retirement benefits and may receive only normal retirement benefits. Ky. Rev. Stat. Ann. § 16.582(2)(b) (LexisNexis Supp. 2007); see J.A. 61, 62. The amount of such benefits is based on the years such an individual *actually* worked, with no imputation of additional years that the employee *might have* worked if he had remained healthy. And even when a hazardous duty employee becomes disabled before he reaches age 55, KRS will impute (at most) only the number of additional years remaining before the individual's 55th birthday. As a result, a younger disabled worker may be credited with more imputed years of service than an older colleague, and thus receive higher disability retirement benefits, even though their *actual* years of service are the same.[3]

The consequence of the KRS scheme is that, when two hazardous duty workers with the same length of service and the same final compensation become disabled, the older worker's retirement benefits will often be lower, and will never be higher, than the benefits paid to the younger wor-

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[3] For example, if a 54-year-old employee with ten years of service becomes disabled, KRS will impute one additional year and will calculate the worker's disability retirement benefits as though he had served for 11 years. A 45-year-old disabled worker with ten years of service, by contrast, would be credited with ten imputed years, and his benefits would be calculated on the basis of 20 years of service.

ker. The opinion of the court of appeals panel includes a chart demonstrating how individuals with the same length of actual service (ten years) and the same final compensation ($50,000) will receive substantially different monthly retirement benefits depending on the ages at which they become disabled:

Age at Disability	Final Pay	# Years Service	Multiplier	Annual Benefits	Monthly Payment
55 or older	$50,000	10	10	$12,500	$1,041.66
53	$50,000	10	12	$15,000	$1,250.00
50	$50,000	10	15	$18,750	$1,562.50
48	$50,000	10	17	$21,250	$1,770.83
45 or younger	$50,000	10	20	$25,000	$2,083.33

J.A. 42.[4]

3. Charles Lickteig was employed in a hazardous duty position by the Jefferson County Sheriff's Department, a participant in the retirement system operated by KRS. J.A. 60. When Lickteig became unable to work due to disability, he applied to KRS for disability retirement benefits. *Ibid.* At that time, Lickteig was 61 years old and had

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[4] The KRS plan also guarantees a hazardous duty employee who is eligible for disability retirement and becomes disabled in the line of duty a monthly benefit of at least 25% of his monthly final rate of pay. Ky. Rev. Stat. Ann. § 16.582(6)(a) (LexisNexis Supp. 2007); see J.A. 63-64. If such an employee has dependent children, the employee is entitled to a dependent-child benefit of 10% of his monthly final rate of pay for each child, up to a maximum for all dependent children of 40% of his monthly final rate of pay. Ky. Rev. Stat. Ann. § 16.582(6)(b) (LexisNexis Supp. 2007); see J.A. 64. Those benefits are not available to an otherwise eligible employee in a hazardous job who becomes disabled in the line of duty after turning 55. Ky. Rev. Stat. Ann. § 16.582(2)(b) (LexisNexis Supp. 2007); see J.A. 64.

17 years and seven months of service. *Ibid.* KRS notified Lickteig that, under Kentucky law, he was ineligible for disability retirement because he was over 55 and in a hazardous position. J.A. 60-61.[5]

Lickteig filed a charge with the EEOC, alleging that he had been denied benefits because of his age. J.A. 61. The EEOC sought to resolve Lickteig's discrimination charge through informal means, but those efforts proved unsuccessful. J.A. 66. The EEOC then filed suit against petitioners KRS, the Jefferson County Sheriff's Office, and the Commonwealth of Kentucky, alleging that petitioners maintain an employee benefit plan that denies or pays fewer disability retirement benefits to older individuals because of age, in violation of the ADEA. *Ibid.* The EEOC sought declaratory, injunctive, and monetary relief for Lickteig and a class of individuals who were alleged to have suffered discrimination on the basis of age in the operation of the KRS disability retirement program. See J.A. 9-16.[6]

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[5] The affidavit of KRS's Director states that Lickteig worked for an additional year after his application for disability retirement benefits was denied. J.A. 18. The affidavit further states that Lickteig was then awarded unreduced normal retirement benefits; that he also purchased 22 months of military service pursuant to Ky. Rev. Stat. Ann. §§ 61.555 and 78.545(6); and that his benefits were then based on 245 months of service. J.A. 18-19 & nn. 1-2.

[6] The KRS plan also provides normal and disability retirement benefits to employees in non-hazardous positions. Such employees are eligible for unreduced normal retirement benefits at age 65 or after 27 years of service. Ky. Rev. Stat. Ann. § 61.510(18) (LexisNexis Supp. 2007); *id.* § 61.595(1) and (2)(b) (LexisNexis 2004). The normal retirement benefit of an employee in a non-hazardous job is approximately two percent of final compensation multiplied by years of service. *Id.* § 61.595(1). Like employees in hazardous positions, non-hazardous duty workers who become disabled after reaching normal retirement age (65) are ineligible for disability retirement benefits, and their normal retirement benefits are computed based on the number of years

Petitioners moved to dismiss the suit on Tenth and Eleventh Amendment immunity grounds, but the district court denied the motion, and the court of appeals affirmed. J.A. 66-67. On remand, the parties filed cross-motions for summary judgment. J.A. 67. Petitioners asserted both that the EEOC had not established a prima facie case of discrimination and that any such discrimination fell within an express statutory exception to the ADEA's general ban. J.A. 25; see 29 U.S.C. 623(f)(2)(B)(i) and (ii).

The district court granted summary judgment to petitioners. J.A. 24-33. The district court believed that the KRS plan was not "discriminatory, either facially or through disparate treatment combined with intent." J.A. 29. Relying in part on *Lyon* v. *Ohio Education Ass'n*, 53 F.3d 135 (6th Cir. 1995), the court stated that invalidation of the KRS plan would do "nothing to further the purpose of the ADEA, which is to prevent employers from making employment decisions (including provision of benefits) based on denigrating stereotypes about age." J.A. 28; see J.A. 27-29. The court concluded that petitioners had

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actually worked. Non-hazardous duty workers who become disabled before age 65, by contrast, may be eligible for disability retirement benefits. Such workers may be credited with imputed years of service, and their benefits may be increased accordingly. The EEOC's complaint in this case asserted claims on behalf of both hazardous and non-hazardous duty retirees. See J.A. 12. However, because Lickteig himself was a hazardous duty employee, and because analogous legal issues are raised by the ADEA's application to hazardous and non-hazardous duty workers covered by the KRS program, the parties and the courts below have focused their analysis on the plan's application to hazardous duty workers. See Pet. Br. 4 n.1; J.A. 26 n.1, 39, 61-62.

identified a legitimate nondiscriminatory reason for the use of age in the KRS disability retirement program:

> Service credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled. The credits are an attempt to provide an employee who becomes disabled before normal retirement with benefits similar to those which, had the employee been capable of continuing work through normal retirement, he would have been entitled to receive.

J.A. 31.

4. A panel of the court of appeals affirmed. J.A. 36-54.

a. The panel acknowledged that KRS's scheme for computing retirement benefits "appears to disadvantage older workers by virtue of the fact that a class of workers, determined in significant part by age (actually youth), gets unworked years attributed to them for purposes of calculating the amount of disability retirement." J.A. 39-40. By contrast, the panel observed, "[w]hen workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits," which are computed on the basis of *actual* years of service. J.A. 40. The panel explained that,

> [u]nder this scheme, disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less than twenty years of service) and the same final compensation. The employee who receives normal retirement benefits will be entitled to 2.5% of his final compensation times his actual service years, whereas the employee who will receive disability retirement benefits will receive the same 2.5% of his final compensation, but will have it multiplied by a number that is

higher than his actual years of service, leading to a higher benefit.

J.A. 41-42.

b. Notwithstanding those concerns, the panel concluded that the Sixth Circuit's prior decision in *Lyon* required affirmance of the district court's judgment. J.A. 44-54. The panel noted that the court in *Lyon* had "upheld an early retirement plan that attributed unworked years to younger workers in order to calculate benefits," even though the plan calculated older workers' benefits by reference to actual years of service. J.A. 44. The panel concluded that, "[b]ecause the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA." J.A. 48.

5. The court of appeals granted rehearing en banc, reversed the district court's grant of summary judgment for petitioners, and remanded for further proceedings. J.A. 56-97. The court held that the EEOC had "established a prima facie violation of the ADEA, because the KRS plan is facially discriminatory on the basis of age." J.A. 59. The court further ruled "that when an employment policy or benefit plan such as the KRS plan is facially discriminatory, a plaintiff challenging the policy does not need additional proof of discriminatory animus in order to establish a prima facie disparate-treatment claim." *Ibid.* The court concluded "that *Lyon*'s standard for a disparate-treatment age-discrimination claim is inconsistent with Supreme Court authority as well as the rulings of several of our sister circuits in cases involving the similar role of age in employee-benefit plans." *Ibid.* The court "therefore overrule[d] in part [its] previous decision in *Lyon*." *Ibid.*

The court of appeals explained that, under this Court's precedents, "an employer's reliance 'upon a formal, facially

discriminatory policy requiring adverse treatment of employees [on the basis of age]' establishes a prima facie disparate-treatment claim under the ADEA." J.A. 72 (quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993)). Applying that principle to the facts of this case, the court concluded that the KRS plan "is facially discriminatory on the basis of age in at least two ways." J.A. 73. First, the court observed that the KRS plan "categorically excludes" employees over age 55 from disability benefits that are available to younger employees who are "similarly situated in all relevant respects other than age." J.A. 73-74. Second, the court explained that the KRS plan is facially discriminatory because "employees who become disabled when they are still 'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." J.A. 74.

The court of appeals rejected petitioners' contention that the ADEA requires proof of a discriminatory animus against older workers. J.A. 77-81. The court explained that, under this Court's decisions, "[o]nce a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee 'because of' the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself." J.A. 78.

Chief Judge Boggs dissented. J.A. 83-97. He concluded that the KRS plan was lawful because the plan "considers age only in combination with years of service and years to retirement age." J.A. 84. Chief Judge Boggs would have upheld the plan as a "non-discriminatory way of providing workers with protection against disability before they have

had an opportunity to earn a normal pension at retirement age." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly held that the EEOC has established a prima facie violation of the ADEA because the KRS plan facially discriminates on the basis of age, and that petitioners therefore were not entitled to summary judgment at this stage.

A. On their face, the KRS plan provisions governing disability retirement violate the ADEA's general ban on age-based employment criteria that disadvantage older workers. If a 60-year-old employee with 15 years of service becomes disabled, his retirement benefits under the KRS plan are calculated using his actual years of service. By contrast, a 50-year-old disabled worker with the same tenure and final compensation would be credited with five additional years of service and would receive a larger monthly benefit. The effect of the KRS plan provisions that govern disability retirement is that the benefits paid to older disabled workers will often be lower, and will never be higher, than the benefits paid to similarly situated younger employees. Because the KRS plan employs explicit age-based criteria that disadvantage older workers, the plan is facially discriminatory and violates the ADEA unless petitioners can establish on remand the cost-justification defense provided by 29 U.S.C. 623(f)(2)(B)(i).

B. The fact that Kentucky uses age 55 as an eligibility threshold for normal retirement benefits does not justify the age-based disparities in benefits just described. So far as the ADEA is concerned, Kentucky is free to provide payments to workers who become disabled before they can satisfy the State's age-and-service requirements for normal retirement benefits. The discriminatory feature of the KRS

plan is not that it renders those younger employees eligible for retirement benefits, but that it disadvantages older disabled workers by using age-based criteria to determine whether, and to what extent, additional years of service will be imputed for purposes of benefit computation. Because both 60- and 50-year-old disabled workers with at least five years of service would be entitled to retirement benefits under Kentucky law, the older worker's eligibility for "normal" retirement provides no basis for using a more generous formula to calculate the younger employee's benefits. The fact that the KRS plan advantages older *voluntary* retirees, by making 55-year-olds eligible for normal retirement benefits with as little as five years of service, likewise does not justify the State's age-based discrimination against older *disabled* workers. Favorable treatment of one class of older workers does not justify discrimination against a different group of older workers.

C. Because the KRS plan computes disability retirement benefits by using explicit age-based criteria that disadvantage older disabled workers, the plan is facially discriminatory, regardless of the State's justifications for those disparities. When a plaintiff shows that an employer has adopted a "facially discriminatory policy requiring adverse treatment of employees [on the basis of age]," *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993), it has made a prima facie case of "arbitrary age discrimination" within the meaning of the ADEA, without regard to whether a particular form of disparate treatment reflects invidious stereotypes. That conclusion reflects the settled rule that discriminatory intent is presumed in the case of facial discrimination, and that the alleged absence of a "malevolent motive" is not a defense when the challenged employment practice discriminates on its face. *International Union, UAW* v. *Johnson Controls*, 499 U.S.

187, 199 (1991). Acceptance of the justification proffered by petitioners in this case—*i.e.*, that older disabled workers are likely to be more self-sufficient financially than younger disabled employees with the same length of service—would be particularly disruptive, since that generalization could be used to legitimize any number of explicit age-based disparities in other benefits and even wages. Moreover, allowing facial discrimination to take place absent a "malevolent motive" cannot be squared with Congress's recognition of an affirmative defense that specifies the narrow circumstances in which a facially discriminatory plan is lawful.

D. The text and history of the OWBPA confirm that the ADEA in its current form prohibits the age-based disparities in the KRS plan unless petitioners can show that those disparities are cost-justified. The OWBPA was enacted in response to this Court's decision in *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158 (1989), in which the Court applied the ADEA in its then-current form to an Ohio benefits plan that, like the KRS program, provided lower retirement benefits to an older disabled worker than a similarly situated younger employee would have received. The Court acknowledged the facially disparate treatment of older and younger workers under the Ohio plan. Based on its determination that the phrase "compensation, terms, conditions, or privileges of employment" in 29 U.S.C. 623(a)(1) (1988) did not encompass fringe benefits, however, the Court in *Betts* held that the challenged disparity would not violate the Act unless that disparity "was the result of an intent to discriminate in some non-fringe-benefit aspect of the employment relation." 492 U.S. at 182. In response to that decision, Congress enacted the OWBPA to make clear that the ADEA's general ban on age-based discrimination in employment *does* cover fringe benefits, while creating a new cost-justification defense. The OWBPA

removes any doubt that the ADEA in its current form prohibits the type of age-based disparities in the KRS plan, unless they are cost-justified.

E. Even if the ADEA were ambiguous with respect to the question presented here, this Court should defer to the EEOC's view that the Act prohibits the age-based disparities reflected in the KRS plan. The position taken by the EEOC in this case is consistent with a published regulation that Congress expressly incorporated by reference in the OWBPA, and with agency guidance that specifically addresses disability retirement provisions that impute additional years of service to younger employees.

ARGUMENT

The court of appeals held that the EEOC has established a prima facie case of age discrimination under the ADEA sufficient to preclude a grant of summary judgment for petitioners, and it remanded the case for further proceedings. That decision was based on the court's conclusion that it is sufficient for a plaintiff to show that a plan discriminates on its face on the basis of age in computing retirement benefits. That decision is correct and should be affirmed by this Court. On remand, petitioner will have an opportunity to show that its facially discriminatory plan fits within one of the Act's exceptions, such as the cost-justification defense. But petitioners were not entitled to summary judgment on the record before this Court.

A. The KRS Plan Is Facially Discriminatory Because It Mandates Adverse Treatment Of Many Older Disabled Workers On The Basis Of Their Age

1. The ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual [age 40 or older] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's

age." 29 U.S.C. 623(a)(1); see 29 U.S.C. 631(a). As amended by the OWBPA, the ADEA provides that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 630(*l*). The ADEA thus generally "forbids discriminatory preference for the young over the old" in providing benefits to employees 40 and older, see *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 584 (2004), and "requires the employer to ignore an employee's age (absent a statutory exemption or defense)," *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993).

2. As the en banc court of appeals explained, "KRS does not dispute that its plan pays lower disability-retirement benefits to an older worker who, apart from age, is similarly situated to a younger worker in all relevant respects." J.A. 74. For example, if a 60-year-old worker with 15 years of service becomes disabled, the worker is ineligible for disability retirement benefits, and his normal retirement benefits are calculated using his *actual* years of service. The number 15 is then multiplied by the employee's final annual compensation, and the worker's annual retirement benefit is 2.5% of that product. In computing normal retirement benefits, even for an individual who has been forced to retire due to disability, KRS does not attempt to estimate and give credit for the number of additional years the retiree might have worked if he had remained healthy.

By contrast, if a 50-year-old employee with the same length of service becomes disabled, his retirement benefits are not calculated on the basis of his *actual* 15 years of service. Rather, under the terms of its disability retirement program, KRS will impute an additional five years of service and will calculate the worker's benefits as though he

had served for 20 years. See Ky. Rev. Stat. Ann. § 16.582(5)(a) (LexisNexis Supp. 2007); J.A. 40 & n.2. "Under this scheme," the court of appeals recognized, "disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less than twenty years of service) and the same final compensation." J.A. 41-42. As a result, the 60-year-old individual will receive a significantly lower annual benefit than a 50-year-old worker who is otherwise similarly situated—*i.e.*, who has the same actual length of service and the same final compensation, and who has likewise been forced to retire due to disability.

The discriminatory character of the KRS program is not limited to its treatment of individuals who are older than 55 when they become disabled and who are therefore altogether ineligible for disability retirement benefits. Consider, for example, two hazardous duty workers, each of whom has ten years of service, who become disabled at ages 54 and 45 respectively. The older worker is eligible for disability retirement benefits, but KRS will impute only one additional year of service, and the employee's benefits will be calculated as though he had served for 11 years. The younger worker will receive 10 imputed years of service, and his benefits will be calculated as though he had served for 20 years. If the two employees have the same final compensation, the younger retiree will receive nearly twice as great an annual disability retirement benefit as the older individual, even though the two are similarly situated with respect to all relevant factors other than age.

3. The disparities described above reflect discrimination "because of [an] individual's age." 29 U.S.C. 623(a)(1). Both the relevant Kentucky statutes and KRS's course of conduct in this case reflect explicit age-based distinctions. Hazardous duty workers who are more than

55 years old are categorically excluded from eligibility for disability retirement benefits, regardless of their years of service. See Ky. Rev. Stat. Ann. § 16.582(2)(b) (LexisNexis Supp. 2007). Consistent with that statutory bar, Charles Lickteig was informed that, under Kentucky law, an individual "must * * * be under age 55 * * * to qualify for Disability Retirement," and that Lickteig himself was "not eligible to apply for Disability Retirement since [he was] over age 55." J.A. 61. And for purposes of calculating disability retirement benefits for persons who *are* eligible, Kentucky law states that, "if the member's total service credit on his last day of paid employment in a regular full-time position is less than twenty (20) years, service shall be added beginning with his last date of paid employment and continuing to his fifty-fifth birthday." Ky. Rev. Stat. Ann. § 16.582(5)(a) (LexisNexis Supp. 2007). The statute thus makes the distinctly advantageous feature of disability retirement under Kentucky law—*i.e.*, the availability of increased benefits reflecting imputed years of service that the employee might have worked if he had not become disabled—directly dependent on the individual's age.

The explicit age-based criteria in the statutory scheme can result in stark disparities between the benefits paid to otherwise similarly-situated individuals. When a hazardous duty worker covered by the KRS program is forced to retire due to disability, the determination of his eligibility and the computation of his benefits ordinarily involves a simple arithmetic calculation to which only three criteria are relevant: the employee's final compensation, his years of service, and his age at the time of retirement.[7] When the

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[7] As noted, see note 4, *supra*, when a hazardous duty employee suffers a disability in the line of duty, he is entitled to disability retirement benefits of no less than 25% of his final rate of pay, with additional benefits for any dependent children. Ky. Rev. Stat. Ann. § 16.582(6)(a)-

first two criteria are held constant and employees of different ages are compared, the benefits paid to the younger worker will often be higher, and will never be lower, than the benefits paid to the older employee. As the court of appeals panel recognized, the benefits paid to younger disabled workers can be as much as double the benefits paid to older employees who are similarly situated except with respect to age. J.A. 42; see p. 6, *supra*.

4. Petitioners' reliance (Br. 25-27) on *Hazen Paper* is misplaced. The Court in *Hazen Paper* considered and rejected an ADEA disparate-treatment claim asserted by an employee who had been fired because his pension benefits were about to vest based on his nearly ten years of service. 507 U.S. at 608-614. The Court recognized that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense)." *Id.* at 612. The Court observed, however, that "an employee's age is analytically distinct from his years of service" because "[a]n employee who is younger than 40 * * * may have worked for a particular employer his entire career, while an older worker may have been newly hired." *Id.* at 611. "Because age and years of service are analytically distinct," the Court explained, "an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Ibid.* The Court concluded that the decision "to fire an older employee solely because he has nine-plus years of service and therefore is 'close to vesting' would not constitute discriminatory treatment on the basis of age." *Id.* at 612; see *Smith* v. *City of Jackson*, 544 U.S. 228, 237-238 (2005) (explaining that the plaintiff in *Hazen Paper* "did not

(b) (LexisNexis Supp. 2007). Like the imputation of additional service years, those benefits are unavailable to workers who become disabled after age 55.

state a cause of action under a *disparate-treatment* theory" because the "motivating factor" for his discharge was not "the employee's age, but rather his years of service, a factor that the ADEA did not prohibit an employer from considering when terminating an employee").

Unlike the employer in *Hazen Paper*, administrators of the KRS program cannot "ignore an employee's age," as the ADEA generally requires, see *Hazen Paper*, 507 U.S. at 612, when a disabled worker applies for retirement benefits. The applicable Kentucky statutes require consideration of the applicant's age to determine whether, and to what extent, the worker will be credited with additional imputed years of service for purposes of benefit computation. Nor can petitioners plausibly claim that older workers in the circumstances described above (see pp. 16-17, *supra*) are disadvantaged based on a consideration, such as tenure of service, that is "analytically distinct" from age. *Id.* at 611. To the contrary, the essence of the disparate-treatment claim in this case is that older disabled employees will often receive significantly lower retirement benefits than KRS would have awarded to a younger disabled worker *with the same length of service*. See p. 6, *supra*. In short, the discriminatory feature of the Kentucky benefits system is the way in which age—not years of service—affects the computation of benefits.

As the en banc court of appeals recognized (see J.A. 73, 78), KRS's explicit reliance on age to calculate retirement benefits is analogous not to the termination decision involved in *Hazen Paper*, but to the employment practices that were held to be facially discriminatory in *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and *International Union, UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991). In *Manhart*, this Court held that a retirement plan that paid equal monthly re-

tirement benefits to similarly situated men and women, but required female employees to make larger monthly contributions to the pension fund, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *Manhart*, 435 U.S. at 705. The Court acknowledged that, in setting a higher contribution rate for female employees, the employer had not relied on "'stereotyped' impressions about the characteristics of males or females," or "a fictional difference between men and women." *Id.* at 707. Rather, the employer had based its decision on "a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men." *Ibid.* The Court held, however, that the employer's motives could not redeem a practice that, "on its face, discriminated against individual employees because of their sex." *Id.* at 716.[8]

In *Johnson Controls*, an employer adopted a policy of excluding fertile women, but not fertile men, from certain lead-exposed jobs. 499 U.S. at 190-192. The Court held that "Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing." *Id.* at 198. The Court further explained that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whe-

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[8] In *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), the Court held that a retirement plan that paid women lower monthly benefits than men who deferred the same amount of compensation violated Title VII. The Court relied on *Manhart*'s holding that a plan requiring women to make greater contributions than men discriminates because of sex "for the simple reason that it treats each woman in a manner which but for her sex would have been different." *Id.* at 1081 (citation, internal quotation marks, and brackets omitted). The Court concluded that "the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." *Ibid.*

ther an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Id.* at 199. The Court concluded that the employer's policy was facially discriminatory because it "[did] not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Id.* at 200 (quoting *Manhart*, 435 U.S. at 711 (in turn quoting United States Commission on Civil Rights Enforcement Effort, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1970))). The Court then considered and rejected the employer's contention that its exclusion of fertile women from the jobs in question fell within the "bona fide occupational qualification" (BFOQ) exception to Title VII's ban on sex-based employment discrimination. *Id.* at 200-207.

This Court's decisions in *Manhart* and *Johnson Controls* make clear that sex-based distinctions in employment are facially discriminatory even when they are adopted for benign reasons or are premised on accurate generalizations about male and female employees (*e.g.*, that the average woman lives longer than the average man). This Court's "interpretation of Title VII * * * applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII." *TWA* v. *Thurston*, 469 U.S. 111, 121 (1985) (citation and internal quotation marks omitted); accord *City of Jackson*, 544 U.S. at 233-234 (plurality opinion). Where, as here, "the evidence shows treatment of a person in a manner which but for that person's [age] would be different," *Johnson Controls*, 499 U.S. at 200 (quoting *Manhart*, 435 U.S. at 711) (internal quotation marks omitted),

the ADEA's general prohibition on age-based discrimination therefore similarly governs without regard to the employer's subjective motivations for adopting the practice in question.[9]

5. This does not mean that a plan that facially requires adverse treatment of older workers because of their age necessarily violates the ADEA. In certain respects, the ADEA's exceptions to the general ban on age-based discrimination in employment differ from the exceptions contained in Tile VII. For example, whereas Title VII lacks a cost-justification defense, *Manhart*, 435 U.S. at 716-717, the ADEA expressly includes such a defense. By its terms,

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[9] Although Title VII prohibits sex-based discrimination in employment regardless of whether male or female employees are advantaged, this Court has construed the ADEA not to address employment practices that *favor* older workers. See *Cline*, 540 U.S. at 586-600. Relying on *Cline*, petitioners contend (Br. 48) that, "[e]ven though classifications on the basis of gender or race are routinely viewed as facially discriminatory without any further reflection about the underlying motive," age-based classifications should be analyzed differently even when (as here) they disadvantage older workers. That argument lacks merit. The Court's analysis in *Cline* focused on the ADEA term "age," a word that does not appear in Title VII's anti-discrimination provision. See *id.* at 597 ("The term 'age' employed by the ADEA is not * * * comparable to the terms 'race' or 'sex' employed by Title VII."). The Court concluded that, for purposes of the ADEA's basic anti-discrimination provision, the term "'age' means 'old age.'" *Id.* at 596; see *id.* at 592 n.5. The Court did not suggest that the term "discriminate," which appears in both the ADEA and Title VII, see 29 U.S.C. 623(a)(1); 42 U.S.C. 2000e-2(a)(1), should be interpreted differently in the two statutes, and there is no basis for reaching that conclusion. Cf. *City of Jackson*, 544 U.S. at 233-234 (plurality opinion) (relying on Title VII precedents in holding that the ADEA authorizes disparate-impact claims); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (treating the Court's Title VII decisions as a ground for deferring to the EEOC's view that ADEA disparate-impact claims are cognizable).

that defense permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i). But that *defense* is just that; it provides a specific circumstance in which a facially discriminatory plan is permissible. It does not suggest that some additional showing by the EEOC is necessary with respect to a facially discriminatory plan.

The ADEA also contains other exceptions. For example, it permits an employer to adopt a "voluntary early retirement incentive plan" that is consistent with the relevant provisions of the ADEA, 29 U.S.C. 623(f)(2)(B)(ii), and to deduct from long-term disability benefits the amount of pension benefits "for which an individual who has attained the later of age 62 or normal retirement age is eligible," 29 U.S.C. 623(*l*)(3)(B). The ADEA also permits an employer to adopt an employment practice that would otherwise be prohibited "where age is a [BFOQ] reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1); see note 15, *infra*. But absent proof of such a statutory exception, a plan that facially requires adverse treatment of older workers because of their age violates the ADEA.

Petitioners have argued in this case that the KRS plan's reduction in benefits for older workers—even if facially discriminatory—is lawful under the cost-justification defense in 29 U.S.C. 623(f)(2)(B)(i). The court of appeals did not rule on that issue, and petitioners may press that claim on remand.

B. The Fact That KRS Uses Age As A Criterion For Awarding Normal Retirement Benefits Does Not Excuse KRS's Age-Based Discrimination In The Provision Of Disability Retirement Benefits

Petitioners do not dispute that, in circumstances where a worker's age renders him ineligible for the imputed years of service that KRS's disability retirement plan provides, the worker may receive a lower retirement benefit than KRS would have paid to an employee with the same length of actual service who became disabled before age 55. Petitioners emphasize, however, that the KRS plan permissibly uses age as an eligibility criterion for normal retirement benefits. Petitioners contend that the KRS disability retirement plan is non-discriminatory because it differentiates on the basis of eligibility for normal retirement benefits, not on the basis of age qua age. That argument lacks merit.

1. Under the KRS plan, a hazardous duty worker 55 years of age or older is eligible for unreduced normal retirement benefits if he has at least five years of service. A younger employee, by contrast, must accumulate 20 years of service in order to qualify for unreduced normal retirement benefits. That use of age as a threshold for benefits is consistent with 29 U.S.C. 623(*l*)(1)(A), which states that an employer's use of "a minimum age as a condition of eligibility for normal or early retirement benefits" does not violate the ADEA's ban on age-based discrimination.[10] And even if the ADEA did not expressly auth-

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[10] In enacting the OWBPA, Congress recognized that "employee pension benefit plans" typically "establish a minimum age as a condition of eligibility for early or normal retirement benefits" by providing, for example, "that benefits are not payable until an individual reaches the age of 55, 60, or 65." S. Rep. No. 263, 101st Cong., 2d Sess. 20 (1990)

orize the establishment of a minimum age for retirement benefit eligibility, this Court's decision in *Cline* would foreclose any contention that such a requirement violates the Act by discriminating against younger workers. See note 9, *supra*. Petitioners are therefore correct that the ADEA does not prohibit *all* uses of age as a criterion for awarding retirement benefits.

The fact that an age-55 cut-off is permissibly used for one purpose, however, does not mean that it ceases to be an age-based criterion. Petitioners could not mandate, for example, that workers who are eligible for normal retirement benefits, but who choose to remain in the work force, will be paid lower wages than employees who do not qualify for normal retirement. Precisely because age-based thresholds are so commonly used as prerequisites for retirement benefits, the ADEA's general ban on age-based discrimination would be easily circumvented if eligibility for retirement could routinely be treated as a legitimate "non-discriminatory" ground for discriminating, with respect to *other* employment-related decisions, against workers who have reached that age-based threshold.

Petitioners' argument is particularly unavailing in light of this Court's decision in *Cline*. The Court in *Cline* held that, for purposes of the ADEA's ban on age-based discrimination, employment practices that advantage older workers are not properly analogized to practices that adversely affect older employees. See 540 U.S. at 590-594.

(*OWBPA Senate Report*); H.R. Rep. No. 664, 101st Cong., 2d Sess. 38 (1990) (*OWBPA House Report*). Congress enacted Section 623(*l*)(1)(A) in order "to make clear that this practice, a universally accepted part of pension plan design * * *, does not violate the ADEA's prohibition against differential benefits based on age." *OWBPA Senate Report* 20; *OWBPA House Report* 38.

Petitioners' effort to equate the two—*i.e.*, its argument that if KRS can differentiate *in favor* of older workers in determining eligibility for normal retirement benefits, it can turn around and use the same age-55 threshold as a basis for paying older disabled employees *lower* benefits than similarly situated younger disabled workers would receive—cannot be reconciled with *Cline*.[11]

2. Petitioners contend (Br. 21) that "[t]his case is here because Kentucky opted to boost unfortunate employees who become disabled *before* reaching eligibility for normal retirement." That description both overstates the practical effect of the court of appeals' decision and ignores the feature of the KRS program that causes it to discriminate on the basis of age. The ADEA does not preclude KRS from extending unreduced retirement benefits to persons under the age of 55 who have between five and 20 years of service and are forced to retire due to disability. If the benefits for that category of retirees were calculated on the same basis as the benefits for older retirees—*e.g.*, on the basis of *actual* years of service—inclusion of the younger workers within the class of eligible beneficiaries would not result in age-based discrimination. Nor would the ADEA be violated simply because KRS chose to describe the payments made to younger workers as "disability" retirement

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[11] Petitioners suggest (*e.g.*, Br. 36-37) that, because KRS's eligibility for normal retirement benefits can be premised on length of service as well as on age, the eligibility criteria for disability retirement benefits have the same potential to disadvantage more senior workers that they have to disadvantage older employees. That is incorrect. Under the KRS program, there is *no* scenario in which, as between two disabled employees who are similarly situated with respect to all factors except length of service, the more junior employee will receive a higher retirement benefit. In a broad range of circumstances, by contrast, a younger disabled employee will receive a higher benefit than an otherwise similarly situated older disabled worker. See pp. 16-17, *supra*.

benefits and the payments made to older workers as "normal" retirement benefits. See J.A. 82 (Rogers, J., concurring separately) ("[I]t is not facial discrimination to give older workers one kind of retirement plan and younger workers the same plan with a different name.").

The discriminatory feature of the actual KRS program is not that younger disabled persons are made *eligible* for retirement benefits, but that their benefits are computed using a formula that is more generous than the one used for older workers. And, as the relevant provisions of Kentucky law make clear, the imputation of additional years of service is unnecessary to effectuate the legislature's intent that disabled persons should receive unreduced retirement benefits even if they cannot satisfy the age-and-service requirements that apply to voluntary retirees. The class of persons who are *eligible* for disability retirement benefits is defined by Ky. Rev. Stat. Ann. § 16.582(2) (LexisNexis Supp. 2007) to include persons who "have sixty (60) months of service, twelve (12) of which shall be current service." The statutory authorization for imputation of additional service credits is contained in a *different* provision, see *id.* § 16.582(5)(a), which governs *computation* of disability retirement benefits for persons whose eligibility has been established. The evident purpose and effect of using imputation is to increase the *amount* of benefits paid to disabled persons who have *already* been identified as eligible, by crediting them for years that they might have worked if they had remained healthy.[12]

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[12] The KRS plan does not disadvantage *every* older disabled worker on the basis of age. For example, a hazardous duty worker with 20 or more years of service who becomes disabled after age 55 will not suffer any age-based discrimination. Because a younger disabled worker with 20 or more years of service would not be credited with any additional imputed service time, see Ky. Rev. Stat. Ann. § 16.582(5)(a) (LexisNexis

Thus, Kentucky's decision to impute *additional* years of service to certain disabled hazardous duty workers (*i.e.*, those who are younger than 55 and have between five and 20 years of service) does not follow inevitably or even naturally from the determination that such persons should be *eligible* for retirement benefits. Rather, the State's decision to use age-based criteria to determine whether additional years will be imputed is a distinct policy choice that requires its own justification. And once it is understood that benefit eligibility is distinct from benefit computation, petitioners' principal rationale for excluding workers older than 55 from the disability retirement program—*i.e.*, that such workers (assuming they have at least five years of service) are already eligible for normal retirement benefits—is a patently inadequate justification for refusing to impute additional service years to older disabled workers. Pursuant to Ky. Rev. Stat. Ann. § 16.582(2)(a) (LexisNexis Supp. 2007), disabled workers with at least five years of service are *also* eligible for retirement benefits, and they would continue to be eligible even if the imputation provision contained in Section 16.582(5)(a) were deleted from the statute. The fact that

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Supp. 2007), the older and younger workers' retirement benefits would both be computed based on actual years of service, and no disparate treatment would exist. But that is not enough. It is undisputed that *some* older disabled workers receive lower retirement benefits than KRS would pay to younger disabled workers who are similarly situated in all relevant respects other than age. The ADEA protects "any *individual*" over age 40 from discrimination "because of *such individual's* age." 29 U.S.C. 623(a)(1) (emphases added). The fact that the KRS plan does not discriminate against every older disabled worker is therefore immaterial to whether the plan discriminates against those older disabled workers who, but for their age, would have been entitled to larger retirement benefits.

older disabled workers are eligible for normal retirement benefits therefore does not meaningfully distinguish them from the younger disabled workers or justify use of a more generous formula in computing the younger workers' benefits.[13]

3. Petitioners contend that "Kentucky finds itself sued precisely because it derived a retirement plan that was especially attractive to older workers." Pet. Br. 51; see *id.* at 16-17. In support of that assertion, petitioners rely on the fact that, under the KRS plan, 55-year-old hazardous duty workers with as little as five years of service are entitled to normal retirement benefits. Petitioners' argument lacks merit.

Petitioners are correct that the KRS plan gives relatively favorable treatment to *one* class of older hazardous duty workers: those who are 55 years old or older, who have between five and 20 years of service, *and who choose to retire voluntarily*. Workers within that class are eligible for unreduced normal retirement benefits, even though voluntary retirees who are younger than 55 must have 20 years of service to qualify for such benefits. That differentiation in favor of older workers is not prohibited—in-

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[13] On a prospective basis, Kentucky could render the KRS program non-discriminatory either by making older disabled workers eligible for disability retirement benefits and imputing additional years of service on an age-neutral basis, or by calculating disability retirement benefits for younger workers on the basis of actual years of service. To the extent that Kentucky is motivated by an understandable impulse to ensure that all disabled employees have an adequate minimum level of benefits, the State can achieve that objective without using any age-based criteria. Alternatively, the State may seek to establish that its disparate treatment of older and younger disabled workers is exempt from the ADEA's general ban on age discrimination under the cost-justification defense contained in 29 U.S.C. 623(f)(2)(B)(i).

deed, is specifically authorized—by the ADEA. See pp. 25-26, *supra*.

The instant case, however, involves the application of the KRS plan to a different class of older hazardous duty workers. The employees on whose behalf the EEOC has sued have not *chosen* to retire but have been forced to do so by reason of disability. Because the ADEA prohibits KRS from "discriminat[ing] against any individual * * * because of such individual's age," 29 U.S.C. 623(a)(1), the fact that the KRS plan (permissibly) favors older *voluntary* retirees does not excuse its adverse treatment of older *disabled* workers. See note 12, *supra*. Especially in light of *Cline*, favorable treatment of one class of older workers does not justify discrimination *against* a different class of workers based on their relatively old age.

Petitioners are also wrong in suggesting that the plan's age-based discrimination against older disabled workers follows inevitably from the State's relative generosity to older voluntary retirees. As explained above, Kentucky is free to provide normal retirement benefits to hazardous duty workers age 55 or older who retire voluntarily with as little as five years of service, and it is also free to provide disability benefits to younger disabled workers with comparable tenure. See pp. 27-28, *supra*. The State's potential liability under the ADEA does not result from either of those choices or from the two in combination, but from the State's further decision to use age-based criteria in imputing additional years of service to younger employees for purposes of disability-benefit computation. Because that decision was in no way compelled by the State's choice of eligibility criteria for normal retirement benefits, petitioners are wrong to contend (Br. 51) that the State has been sued "because it derived a retirement plan that was especially attractive to older workers."

C. Petitioners' Proffered Justification For The KRS Plan's Facial Age-Based Disparities In Retirement Benefits Provides No Basis For Avoiding Liability Under The ADEA

Petitioners contend (Br. 42-51) that, even if the KRS plan results in disparate treatment of employees on the basis of age, the plan does not violate the ADEA because it is not in fact premised on invidious stereotypes about older workers. Petitioners rely in part on the references in the preliminary statement of findings and purpose of the ADEA to Congress's objective of eliminating "arbitrary" age discrimination. Br. 43 (citing 29 U.S.C. 621(a)(2), (4), and (b)). Based on those references, petitioners suggest (Br. 23) that a State may permissibly distinguish on the face of a retirement plan between older and younger disabled workers (by imputing additional years of service to the younger but not the older employee) because the older worker has had additional years to accumulate funds and the younger worker therefore "is likely to need more of a boost." That argument reflects its own stereotypes and for a number of reasons lacks merit.

1. In order to identify the forms of age discrimination that Congress sought to eliminate as "arbitrary," a court "must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate." *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158, 176 (1989). The ADEA's substantive prohibitions do not seek to eradicate "arbitrary age discrimination," 29 U.S.C. 621(b), by requiring a court to decide in each case whether a particular form of age-based disparate treatment reflects denigrating stereotypes. Nor does the condemnation of "arbitrary age discrimination" suggest a preference for "purposeful age discrimination." Rather, the Act reflects the

belief that most purposeful discrimination on the prohibited basis is, in fact, arbitrary in the sense of being reflective of stereotypes rather than legitimate factors.[14]

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[14] As this Court has observed, the ADEA's references to "arbitrary" age discrimination were likely drawn from a report submitted to Congress in 1965 by Secretary of Labor W. Willard Wirtz. See *Cline*, 540 U.S. at 587 n.2, 590; Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (June 30, 1965) (*Wirtz Report*). The *Wirtz Report* concluded, inter alia, "that there was little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits." *City of Jackson*, 544 U.S. at 232. Secretary Wirtz viewed "arbitrary" age discrimination as involving the rejection of older workers based on "assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*." *Wirtz Report* 2; see *Cline*, 540 U.S. at 587 n.2. Because Secretary Wirtz specifically distinguished that phenomenon from discrimination reflecting "dislike or intolerance of older people," *City of Jackson*, 544 U.S. at 232, the Secretary's conception of "arbitrary" age discrimination clearly did not require age-based animus or an invidious motive. Under the heading "Arbitrary Age Discrimination: Specific Age Limits," the *Wirtz Report* stated that "[t]he most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." *Wirtz Report* 6; see *City of Jackson*, 544 U.S. at 255 (O'Connor, J., concurring in the judgment). The Secretary thus treated an employment practice that categorically excludes older workers on the basis of age, without regard to the individual characteristics of a particular employee, as a paradigmatic example of "arbitrary" age discrimination. Although the *Wirtz Report* focused on refusals to hire rather than on the formulae used to calculate employee benefits, KRS's blanket refusal to impute additional years of service to disabled hazardous duty workers beyond the age of 55, and the plan's consequent facial discrimination against older disabled workers in the computation of retirement benefits, constitute a benefits-related analog to the discriminatory employment practices that the *Wirtz Report* characterized as "arbitrary." And, as explained in Part D below, Congress enacted the OWBPA "to make unmistakably clear that the

Accordingly, the Act's substantive prohibitions make it unlawful for an employer to "discriminate" against an older worker "because of such individual's age," 29 U.S.C. 623(a)(1), unless the discrimination falls within one of the ADEA's specified statutory exceptions, such as the exception for benefit plans that are justified by differences in cost, see 29 U.S.C. 623(f)(2)(B)(i). Thus, if an employment practice facially treats older workers less favorably than younger workers because of their age, and if it does not fall within one of the statutory exceptions to Section 623(a)(1)'s general ban, it is by definition "discriminat[ion]" prohibited by the ADEA. That conclusion is reinforced by the fact that in interpreting the key anti-discrimination provision in Title VII on which Section 623(a)(1) was based, this Court has held that facial discrimination on the basis of a prohibited characteristic violates Title VII without regard to whether a plaintiff can identify a "malevolent motive." *Johnson Controls*, 499 U.S. at 199; see pp. 20-23, *supra*.

2. Petitioners have made no effort to demonstrate empirically that workers who become disabled after age 55 are likely to have greater accumulated financial resources than workers with equivalent years of service who become disabled at an earlier age. Instead, they have relied on stereotypical assumptions of the kind the ADEA seeks to eradicate. But even if petitioners could establish a statistical correlation between age and financial wherewithal, the generalization clearly would not be true in every instance, and the correlation would not justify use of age as a proxy for a factor like financial self-sufficiency that could be addressed directly. See *Hazen Paper*, 507 U.S. at 611 (explaining that, under the ADEA, "[t]he employer cannot

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ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits." S. Rep. No. 263, 101st Cong., 2d Sess. 16.

rely on age as a proxy for an employee's remaining characteristics, * * * but must instead focus on those factors directly").

In construing the parallel ban on sex-based discrimination under Title VII, the Court in *Manhart* recognized the statistical validity of the generalization that "[w]omen, as a class, do live longer than men." 435 U.S. at 707. The Court observed, however, that the generalization does not hold true in every instance, see *id.* at 707-708, and concluded that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply," *id.* at 708. The Court emphasized that Title VII "makes it unlawful 'to discriminate against any *individual* * * * because of such *individual's* race, color, religion, sex, or national origin,'" and it held that "[t]he statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Ibid.* (quoting 42 U.S.C. 2000e-2(a)(1)).

Because the ADEA similarly prohibits age-based discrimination against "any individual * * * because of such individual's age," 29 U.S.C. 623(a)(1), the same analysis applies here. See note 12, *supra*. It is true that Congress's enactment of the ADEA was prompted in part by its view that many age-based employment practices reflected *inaccurate* stereotypes about older workers. See *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1983) (explaining that, at the time the ADEA was enacted, "the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers"). Nothing in the text of the ADEA or this Court's ADEA jurisprudence suggests, however, that the Act invited defendants to try to escape

liability by documenting the accuracy of their stereotypical assumptions. Instead, Congress provided specific defenses and otherwise prohibited use of age as a proxy that works to the detriment of older workers.

Thus, where (as here) an employment practice *expressly* mandates that an older worker receive less favorable treatment than a similarly situated younger employee, Section 623(a)(1)'s basic prohibition on age-based discrimination applies without regard to the proffered rationale for the disparity. That conclusion squares with the settled rule that discriminatory intent is present whenever there is facial discrimination. See *Johnson Controls*, 499 U.S. at 199. In particular instances, the accuracy of such generalizations may be relevant to the application of a statutory exemption or defense, such as the cost-justification defense for cases involving age-based disparities in employee benefits. See 29 U.S.C. 623(f)(2)(B)(i). The possibility that the KRS plan might ultimately be upheld on that basis on remand, however, does not call into question the plan's facially discriminatory character. To the contrary, Congress's enactment of Section 623(f)(2)(B)(i), and its directive that the employer "shall have the burden of proving" that defense, 29 U.S.C. 623(f)(2), would be superfluous if the ADEA's basic prohibition were limited to age-based disparities that are necessarily premised on invidious stereotypes. Congress wisely chose a regime of specific, objective defenses over a regime in which certain "non-malevolent motives" for facially discriminatory laws would preclude the establishment of a prima facie case.[15]

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[15] Similarly in construing the BFOQ defense under the ADEA, see p. 24, *supra*, this Court has recognized that the defense cannot be established simply through proof of a statistical correlation between age and an essential job qualification. Rather, the employer must show either that "all or substantially all" persons above a particular age would

The use of age as a proxy for financial wherewithal is both unnecessary and potentially dangerous. To the extent that Kentucky wishes to ensure that disabled workers have some minimum level of financial support, the State can achieve that objective directly through age-neutral measures rather than relying on age as a proxy. Conversely, if the purported correlation between age and financial self-sufficiency could legitimize the payment of lower retirement benefits to older disabled workers than to identically situated younger employees, it presumably could support similar differentials in other benefits and even in wages in an effort to give younger employees "more of a boost." Such an approach would eviscerate the ADEA's protections and would strike at the heart of what the Act was designed to prevent.[16]

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be unable to perform the relevant job safely and effectively, or that it would be "impossible or highly impractical" to conduct an individualized inquiry into the fitness of particular older workers. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 414 (1985) (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976)) (internal quotation marks omitted); see *id.* at 412-417, 421-423. That narrow construction of the BFOQ defense, see *id.* at 422 (recognizing that Congress intended the defense to be a "limited exception" to the general ban on age-based discrimination) would be effectively negated if the existence of a statistical correlation between age and a legitimate employment criterion rendered Section 623(a)(1)'s general ban inapplicable.

[16] The district court upheld the KRS plan, including the imputation of service credits for disabled employees under age 55 who have less than 20 years of service, on the somewhat different rationale that "[s]ervice credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled." J.A. 31. That rationale also lacks merit, essentially for the reasons stated in the text. Presumably some statistical correlation exists between an employee's age at the time of disability and the number of additional years he would have worked if he had remained healthy. But a desire to pay each employee the retirement benefits that he would

D. The Text And History Of The OWBPA Confirm That KRS's Age-Based Discrimination In Awarding Disability Retirement Benefits Is Prohibited By The ADEA Unless The OWBPA's Cost-Justification Defense Applies

Congress's enactment of the OWBPA bolsters the conclusion that facially discriminatory benefits plans like KRS's are prohibited by the ADEA except when the cost-justification defense applies.

1. In *Betts*, this Court applied the ADEA in its then-current form to an Ohio state-sponsored benefit plan similar to the program at issue in this case. The plaintiff in *Betts* was disqualified because of her age (61) from receiving disability retirement benefits, which would have totaled $355 per month, and instead received normal retirement benefits of $158.50 per month. 492 U.S. at 163. This Court recognized that the ADEA "forbids arbitrary discrimination by public and private employers against employees on account of age," *id.* at 161, and that "[o]n its face, the [State's] statutory scheme renders covered employees ineligible for disability retirement once they have attained age 60," *id.* at 166. At the time *Betts* was decided, however, the ADEA provided that it was not unlawful for an employer "to observe the terms of . . . any bona fide employee benefit plan * * * which is not a subterfuge to evade the purposes of [the Act]." *Id.* at 165 (quoting 29 U.S.C. 623(f)(2) (1988)). The Court therefore

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have earned if he had not become disabled cannot justify KRS's approach, which effectively (and irrebuttably) presumes that *no* employee who is disabled after age 55 would have worked an additional day.

stated that it "must consider the meaning and scope of the § [623](f)(2) exemption." *Id.* at 161; see *id.* at 166-182.[17]

The Court in *Betts* rejected the EEOC's view that the former Section 623(f)(2) exemption was limited to benefit plans in which any age-based differentials were cost-justified. See 492 U.S. at 173-175 (discussing 29 C.F.R. 1625.10(b) (1988)). The Court instead concluded that "a post-Act plan cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act." *Id.* at 176. The Court found that construction necessary to ensure that the former Section 623(f)(2) exemption was given meaningful practical effect. The Court explained:

> The phrase "compensation, terms, conditions, or privileges of employment" in § [623](a)(1) can be read to

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[17] In *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), the Court held that a benefits plan adopted before passage of the ADEA in 1967 could not by its nature be a "subterfuge" to evade the purposes of the Act. *Id.* at 203; see *Betts*, 492 U.S. at 167 (discussing *McMann*). Petitioners contend (Br. 39-40) that the Court in *Betts*, in holding that the Ohio benefits plan was not a "subterfuge" within the meaning of former Section 623(f)(2), relied on the fact that the State's exclusion of employees over age 60 from disability retirement benefits had been enacted before 1974, when the ADEA was made applicable to the States. That is incorrect. The Court in *Betts* explained that, while the exclusion of older employees from disability retirement benefits was adopted before 1974, the practical disparity between disability and normal retirement benefits resulted from a separate statutory provision enacted in 1976, which changed the formula for calculating disability retirement benefits. See 492 U.S. at 163, 169. The Court held that, "to the extent this new rule increased the age-based disparity caused by the pre-Act age limitation, *McMann* does not insulate it from challenge." *Id.* at 169. The Court therefore conducted "an inquiry into the precise meaning of the § [623](f)(2) exemption in the context of post-Act plans." *Ibid.*

> encompass employee benefit plans of the type covered by § [623](f)(2). Such an interpretation, however, would in effect render the § [623](f)(2) exemption nugatory with respect to post-Act plans. Any benefit plan that by its terms mandated discrimination against older workers would also be facially irreconcilable with the prohibitions in § [623](a)(1) and, therefore, with the purposes of the Act itself. It is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to evade those purposes, at least where the plan provision was adopted after enactment of the ADEA.

Id. at 177.

To avoid an "interpretation [that] would eviscerate § [623](f)(2)," the Court in *Betts* construed the Act "as exempting the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." 492 U.S. at 177. The Court observed that, "under this construction of the statute, Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other non-fringe-benefit terms and conditions of employment." *Ibid.* The Court further explained that, so construed, "§ [623](f)(2) is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context." *Id.* at 181.

2. The OWBPA was enacted into law approximately 16 months after this Court's decision in *Betts*. The text of the enacted law expressed Congress's view that, "as a result of the decision" in *Betts*, "legislative action [wa]s necessary to

restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 101, 104 Stat. 978 (29 U.S.C. 621 note). To achieve that objective, Congress amended the ADEA's definitional section to provide that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." § 102, 104 Stat. 978 (29 U.S.C. 630(*l*)). Congress also deleted the "subterfuge" exemption contained in former 29 U.S.C. 623(f)(2) (1988). See OWBPA § 103(1), 104 Stat. 978. In its place, Congress substituted new language stating that the ADEA does not prohibit an employer from implementing a benefit plan "where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." § 103(1), 104 Stat. 979 (29 U.S.C. 623(f)(2)(B)(i)).[18]

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[18] Because the decision in *Betts* concerned a state-sponsored benefit plan for public employees, Congress was aware that the ADEA, as amended by the OWBPA, would require adjustments to such plans. Congress sought to accommodate the States' needs through several provisions. First, Congress enacted "a special rule authorizing" state and municipal employers to offer existing employees the opportunity to "make a one-time election to retain coverage under the old plan for disability benefits or to be covered under new disability benefits that conform to the amendments made by this bill." *Explanation of S. 1511*, 136 Cong. Rec. 27,060 (1990); see OWBPA § 105(c)(2), 104 Stat. 981 (29 U.S.C. 623 note). Second, Congress gave state and local governments "two years from the date of enactment to bring their plans into com-

The clear thrust of the Court's analysis in *Betts* was that, if the ADEA's prohibition on age-based discrimination in "compensation, terms, conditions, or privileges of employment" had been construed to encompass retirement and other fringe benefits, the Ohio plan at issue in that case would have been unlawful. The Court declined to adopt that interpretation of the statutory phrase, however, because it concluded that to do so would effectively negate the ADEA's exemption for bona fide employment benefit plans. Congress responded to this Court's decision by defining the ADEA term "compensation, terms, conditions, or privileges of employment" to *include* employee benefits; by deleting the prior broad statutory exemption for any bona fide employee benefit plan that is not a "subterfuge" to evade the Act's purposes; and by enacting a new, narrower exemption for benefit plans in which age-based disparities are cost-justified. In light of the sequence of events that led up to the OWBPA's enactment, the amendments effected by the OWBPA manifest Congress's unambiguous intent that age-based distinctions like those in the KRS plan should be treated as facially discriminatory.[19]

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pliance," while private employers with existing plans that were not subject to collective bargaining had "180 days to be brought into compliance." 136 Cong. Rec. at 27,060; see OWBPA § 105(a) and (c)(1), 104 Stat. 981 (29 U.S.C. 623 note). And third, in response to "[s]ome States" that had "indicated a lack of familiarity with actuarial practices that are well-established in the private sector," 136 Cong. Rec. at 24,607 (statement of Sen. Pryor), Congress directed the EEOC and other federal agencies, upon request, to "provide assistance to state and local governments in identifying and securing independent technical advice" to assist in complying with the new legislation. *Id.* at 27,060; see OWBPA § 105(c)(3), 104 Stat. 982 (29 U.S.C. 623 note).

[19] To eliminate the "double dipping" that could occur if an employee eligible for pension benefits were also entitled to receive long-term disability benefits, the OWBPA permits an employer to deduct from an

3. The OWBPA's legislative history reinforces that view of the statutory language. The Senate and House Reports accompanying the OWBPA explained that, "[t]hrough this legislation, Congress intends to make unmistakably clear that the ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits." *OWBPA Senate Report*; *OWBPA House Report*.[20] The Reports expressed Congress's intent to "overturn[] both the reasoning and holding of the Court in *Betts*." *OWBPA Senate Report* 17; *OWBPA House Report* 33. The Senate and House Reports also stated that the relevant Com-

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employee's long-term disability benefits the amount of "any pension benefits (other than those attributable to employee contributions) * * * paid to the individual that the individual voluntarily elects to receive; or * * * for which an individual who has attained the later of age 62 or normal retirement age is eligible." 29 U.S.C. 623(*l*)(3). That provision would be unnecessary, however, if employers could deny disability retirement benefits altogether to workers who have reached normal retirement age.

[20] In drafting the OWBPA, Congress brought employee benefits within the coverage of the ADEA's ban on age-based discrimination by enacting a new 29 U.S.C. 630(*l*), which provides that "the term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." See OWBPA § 102, 104 Stat. 978; p. 41, *supra*. The OWBPA Committee Reports explain that, "[a]lthough this change could have been accomplished by adding corrective language directly to section [623](a)(1), the Committee[s] chose to avoid that option so as to reinforce congressional intent that the federal courts continue to interpret the substantive prohibitions of the ADEA like the comparable provisions of Title VII." *OWBPA Senate Report* 17; *OWBPA House Report* 33. That history reinforces the conclusion that the ADEA's general ban on age-based discrimination, like Title VII's prohibition on sex-based discrimination, encompasses all facially disparate treatment whether it is based on invidious stereotypes or statistically accurate generalizations. See pp. 22-23 & note 9, *supra*.

mittees had "purposefully eliminated the word 'subterfuge' from the new" cost-justification defense in order to clarify that, subject to any exceptions contained in the OWBPA itself, "the *only* justification for age discrimination in an employee benefit is the increased cost in providing the particular benefit to older individuals." *OWBPA Senate Report* 18; *OWBPA House Report* 34. Congress's shift from a motive-based "subterfuge" defense to an objective cost-justification test makes particularly erroneous petitioners' efforts to suggest that certain "non-malevolent motives" provide a basis for avoiding liability for facially discriminatory plans.[21]

The Reports also reflected Congress's understanding that the OWBPA's ban on age-based discrimination in employee benefits could not be evaded by using a surrogate for age, such as eligibility for normal retirement benefits, as a ground for disparate treatment. Thus, the Reports stated that "*pension benefits are age-related.* Pension eligibility is a proxy for age. Accordingly, it is *per se* age discrimination to use pension-eligibility as a basis for denying an older worker any other benefit." *OWBPA Senate*

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[21] Petitioners contend (Br. 40) that, in enacting the OWBPA, "Congress was focused on eliminating the blanket immunity for older retirement plans" (*i.e.*, those that predated the ADEA's enactment and therefore could not be regarded as "subterfuge[s]" under this Court's decision in *McMann*). That contention is inconsistent with the OWBPA's text and history, and petitioners cite nothing to support it. The Court's crucial holding in *Betts*—*i.e.*, that the phrase "compensation, terms, conditions, or privileges of employment" in Section 623(a)(1) did not encompass fringe benefits—was not limited to pre-Act plans. See 492 U.S. at 177, 181; note 17, *supra*. Congress enacted 29 U.S.C. 630(*l*) to supersede that holding, and the Senate and House Reports expressed disagreement with the *Betts* Court's analysis as it pertained to post-ADEA plans. See *OWBPA Senate Report* 18; *OWBPA House Report* 34.

Report 23; *OWBPA House Report* 40. In introducing the final Senate bill (S. 1511) to his colleagues, Representative Clay similarly explained: "We do not permit employers to pay an older worker less than a younger worker solely because of age; employers must be prohibited from providing older workers smaller benefits or no benefits solely because of their age or other proxies for age for example, pension or Medicare eligibility." 136 Cong. Rec. at 27,058.[22]

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[22] The OWBPA's legislative history also includes a statement prepared on behalf of the Association of Private Pension and Welfare Plans, in opposition to significant features of S. 1511. The statement reflects the Association's understanding of the OWBPA's potential impact on benefit plan provisions materially indistinguishable from the KRS provisions at issue in this case:

> Many plans also provide that employees may receive credited service for periods of disability prior to their normal retirement age. Such crediting of service assures that an employee is not prevented from accruing the benefit that the employee would have been able to earn if the employee had not been disabled. The conceptual framework of such a benefit program hinges on the assumption that an employee is entitled to such credit only for periods prior to normal retirement age. The additional service credited to an individual disabled at a younger age will always exceed the amount credited to an individual who is disabled when older, and therefore could present problems under S. 1511.

Older Workers Protection Act: Joint Hearing on S. 1511 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and the Special Senate Comm. on Aging, 101st Cong., 1st Sess. 209-210 (1989). Notwithstanding that opposition—echoed by petitioners and their amici here—Congress enacted the OWBPA without exempting the age-based benefits enhancements described above.

E. The Position Of The EEOC Is Entitled To Deference

1. Even if the relevant ADEA provisions were ambiguous, it would be appropriate for this Court to defer to the reasonable view of the EEOC that disability retirement criteria like those at issue here violate the Act's general ban on age-based discrimination in employment. As explained above, the OWBPA established a cost-justification defense that incorporates by reference a pre-existing regulation promulgated by the EEOC. See 29 U.S.C. 623(f)(2)(B)(i) (providing that an employer may implement a bona fide employee benefit plan "where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)"). That regulation is entitled "[c]osts and benefits under employee benefit plans," and it defines the circumstances under which the cost-justification defense is available. In enacting the OWBPA, Congress thus unequivocally endorsed the regulatory approach reflected in 29 C.F.R. 1625.10.

Although the primary purpose of the regulation is to define the circumstances under which facially discriminatory plan provisions will be exempt from the ADEA's proscriptions, rather than to address the antecedent question whether particular plan provisions *are* facially discriminatory, one subsection of the rule explains the "[r]elation of section [623](f)(2) [of 29 U.S.C.] to sections [623](a), [623](b) and [623](c)." 29 C.F.R. 1625.10(a)(2). That subsection states:

> Sections [623](a), [623](b) and [623](c) prohibit specified acts of discrimination on the basis of age. Section [623](a) in particular makes it unlawful for an employer

> to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * * ." Section [623](f)(2) is an exception to this general prohibition. *Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section [623](a), and accordingly the practice does not have to be justified under section [623](f)(2).*

Ibid. (emphasis added). The clear implication of the italicized language is that, if an employee benefit plan does *not* "provide[] the same level of benefits to older workers as to younger workers," the plan *will* violate Section 623(a) unless the cost-justification defense or some other statutory exception applies.

2. Guidance issued by the EEOC discusses the circumstances under which an employee benefit plan will be deemed to provide unequal benefits to older and younger workers. See 2 EEOC Compl. Man. (BNA) § 3 at 627:0001 (Oct. 3, 2000) (*EEOC Compliance Manual*). "[B]enefits will not be equal," the guidance explains, "where a plan reduces or eliminates benefits based on a criterion that is explicitly defined (in whole or in part) by age." *Id.* at 627:0004 (emphasis omitted). For example, "[w]here age is one of the criteria for service retirement eligibility," a plan that "denies disability benefits to any employee who is disabled less than 5 years from the date on which s/he would be eligible for service retirement" is using "an age-based distinction" to deny disability benefits. *Ibid.* The guidance further suggests that a chart showing the amount of benefits a plan would pay to employees of various ages, who are similarly situated in all other respects relevant to the benefit calculation, may be used to "determine if age was a factor that

made a difference in the employer's calculation of benefits." *Ibid.*; see J.A. 42; p. 6, *supra*.[23]

The guidance specifically discusses a benefit plan feature, like the one at issue in this case, that calculates an individual's disability retirement benefits by imputing an additional year of service for each year between the individual's age at the time of disability and the normal retirement age. See *EEOC Compliance Manual* 627:0009-627:0010. Under such a plan, the guidance explains, older workers will receive lower benefits than younger workers with the same tenure of actual service because "[b]asing disability retirement benefits on the number of years a disabled employee *would have worked* until normal retirement age by definition gives more constructive years of service to younger than to older employees." *Id.* at 627:0010 (footnote omitted). Because the benefits paid to older and younger workers under such a provision "are not equal," the guidance states, the employer will be in violation of the ADEA unless it can demonstrate that the Act's cost-justification defense applies. *Ibid.*; see 29 U.S.C. 623(f)(2)(B)(i). To establish that defense, "the employer would have to show that—accounting for the likelihood that more workers will qualify for disability retirement as they get older—it

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[23] The guidance further explains that "[b]enefits will * * * be equal if the employer's plan provides that older and younger employees will be paid the same monthly amounts until their deaths—even if the older employee has a shorter life expectancy and is thus likely to receive less in total benefits." *EEOC Compliance Manual* 627:0003. The EEOC's analysis thus focuses on whether similarly situated older and younger retirees receive the same monthly benefits, not on whether the two individuals receive benefit streams that have the same actuarial value as of the date of retirement. Cf. *Manhart*, 435 U.S. at 710 n.19 (noting that the employer in that case had "funded its death-benefit plan by equal contributions from male and female employees," even though a death benefit "has less value for persons with longer life expectancies").

costs as much to pay disability retirement to [older employees] based on [fewer] extra years of service as it does to pay disability retirement to [younger employees] based on [more] extra years of service." *EEOC Compliance Manual* 627:0010.

As explained above, 29 C.F.R. 1625.10(a)(2) indicates that the test for compliance under 29 U.S.C. 623(a)(1) is whether "an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers." The guidance confirms that this is the EEOC's test and illustrates its application to various scenarios, including circumstances materially indistinguishable from this case. Congress has unequivocally endorsed the regulation by incorporating it by reference into 29 U.S.C. 623(f)(2)(B)(i), and the EEOC's interpretation of its own rule "is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (citations and internal quotation marks omitted); see *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (same); *City of Jackson*, 544 U.S. at 243-244 (Scalia, J., concurring in part and concurring in the judgment). Because the construction of 29 C.F.R. 1625.10 that is reflected in the guidance is consistent both with the text of the regulation and with the basic anti-discrimination provision contained in 29 U.S.C. 623(a)(1), it deserves controlling weight.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 06-1037

In The Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.,
PETITIONERS
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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INTEREST OF AMICI CURIAE [1]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce such rights. Almost half of AARP's more than 39 million members are in the work force, most of whom are protected by the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, et seq., as well as by other federal and state work place civil rights laws. Vigorous enforcement of these laws is of paramount importance to AARP, its working members, and millions of other workers of all ages who rely on such laws to deter and to remedy illegal discrimination, including the discriminatory denial of employee benefits based on proximity to eligibility for retirement.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA

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[1] This Brief of Amici Curiae AARP and National Employment Lawyers Association (NELA) in support of Respondent is filed with the consent of both parties. In compliance with Rule 37.6 of this Court, amici state that no counsel for any party authored this brief in whole or in part, and further, that no party or entity other than amici made a monetary contribution to the preparation or submission of this brief.

advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

Amici's concern in this case is that Petitioners are asking this Court to undermine the prohibitions of the ADEA by adopting the erroneous tenet that the statute permits employers to deny benefits to, or otherwise discriminate against individuals because they have reached the minimum eligibility age for retirement. Interpreting the ADEA's prohibition against age discrimination in such a way would turn the Act on its head and render it completely ineffective and unenforceable. Similarly, requiring age discrimination victims to prove that an employer was motivated by inaccurate, age-based stereotypes in order to establish a prima facie case, as urged by the Petitioners, will shield even the most blatant forms of age discrimination from liability. As this Court stated in another context, "We ought not to open the door to an evasion of the statute by this device." Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998).

For these reasons, Amici submit its brief amici curiae.

SUMMARY OF ARGUMENT

This case presents a textbook case of age discrimination in employment. Older workers are denied benefits completely or are provided inferior benefits to those provided to younger workers. The Kentucky Retirement System (KRS) Plan discriminates against older workers in violation of the ADEA in two ways. First, it disqualifies otherwise eligible workers from receiving disability retirement benefits if they have already reached the minimum age to receive normal retirement benefits at the time they become disabled. Second, for those employees who are not so disqualified, the KRS Plan's method of calculating disability retirement benefits favors younger employees over similarly situated older employees. Because age is a direct and deciding factor in determining eligibility for normal retirement, which in turn determines who is eligible for disability retirement benefits, the KRS Plan facially discriminates against older employees in violation of section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1).[2]

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[2] Section 4(a)(1) of the ADEA provides:

> (a) Employer practices It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> 29 U.S.C. § 623(a)(1).

KRS's rationale for denying benefits to older workers – "to provide assistance to members who are unable to continue working, but would not have a source of income through unreduced retirement benefits," Brief of Petitioners at 13, or in other words, to "provide a boost" to younger workers, id. at 23 – is completely irrelevant for two reasons. First, the EEOC has established KRS's liability under the ADEA by showing that its policy of denying or paying reduced benefits to employees simply because they reached, or were nearing the minimum eligibility age for normal retirement benefits, facially discriminates based on age. Nothing in the ADEA or its companion civil rights statutes absolves violators based on their beneficent motivation. Second, the only defense to a claim of unequal benefits based on age is the objective "equal benefit or equal cost"standard contained in section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i). An employer's subjective motivation for denying or paying inferior benefits to older workers is, therefore, irrelevant.

Finally, Petitioners' claim that its use of age to determine eligibility for benefits was not unlawful under the ADEA because it was not based on inaccurate age-based stereotypes must fail. It is the plain language of the statute and not the primary intent of Congress that guides this Court's interpretation of the ADEA. Congress prohibited employers from "discriminat[ing] . . . because of . . . age," 29 U.S.C. § 623(a)(1), not from discriminating because of age-based stereotypes.

I. DENYING DISABILITY BENEFITS TO EMPLOYEES BECAUSE THEY REACHED THE MINIMUM ELIGIBILITY AGE FOR RETIREMENT CONSTITUTES A FACIAL VIOLATION OF THE ADEA.

The denial of an employee benefit to older workers based on their eligibility for retirement, when such eligibility is defined by age, is a clear violation of the ADEA, 29 U.S.C. § 623(a)(1) and 623(f)(2)(B)(i), as amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990). The OWBPA expressly requires employers to provide equal benefits or to incur equal costs in providing benefits to older and younger employees. 29 U.S.C. § 623(f)(2)(B)(i).[3] Under the OWBPA, the discrimination is the difference in the benefits, plain and simple. If an employer provides a benefit to younger workers, but denies that benefit to older workers, the difference in benefits constitutes per se discrimination under the ADEA, regardless of the employer's subjective motivation for structuring the benefit package as it did.

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[3] Congress' articulated purpose behind the passage of the OWBPA was "to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Pub. L. No. 101-433, 104 Stat. 978, Title I, § 101(1990) (codified at 29 U.S.C. § 621).

A. Adverse Employment Actions Directed Against Individuals Because They Have Reached the Minimum Age to Receive Retirement Benefits are "Because of Age" and Violate the ADEA

Since the 1980's, courts uniformly have held that the practice of denying benefits to older employees because their age (sometimes combined with years of service) makes them eligible for retirement benefits violates the ADEA. See EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 222-23 (3d Cir. 1983) ("If eligibility for . . . retirement can be used to justify the denial of [benefits] to older employees, the purpose of the ADEA will be defeated."); EEOC v. Borden's, Inc., 724 F. 2d 1390, 1393 (9th Cir. 1984) (rejecting arguments that a severance policy that denied benefits to retirement-eligible employees "distinguished employees on the basis of their retirement status, and not solely because of age . . . .").[4]

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[4] Accordingly, KRS's bold assertion, without reference to any legal authority, that "it is legal to base eligibility for disability benefits on whether an employee already has a retirement safety net," Brief of Petitioners at 19, could not be any further from the truth. KRS also makes the preposterous assertion that its facially discriminatory plan should be overlooked because it generously allows older workers to be eligible to retire after only five years of service and because those who are most disadvantaged by its plan are those older workers whom KRS was willing to hire despite their age. Brief of Petitioners at 51. The fallacy of this argument is obvious when put into the context of Title VII of the Civil Rights Act of 1964. An employer would never dare to suggest that it be absolved of

The issue was also of central concern to Congress when it enacted the OWBPA. In passing the OWBPA, Congress expressly condemned the very practice that the KRS insists is lawful. Congress declared that "it is per se age discrimination to use pension eligibility as a basis for denying an older worker any other benefits." H.R. Rep. No. 101-664, at 40 (1990); S. Rep. No. 101-263, at 23 (1990) ("[P]ension benefits are age-related. Pension-eligibility is a proxy for age. Accordingly, it is per se discrimination to use pension-eligibility as a basis for denying an older worker any other benefit.") (emphasis in original). In so stating, Congress cited with approval EEOC v. Borden's Inc., 724 F.2d 1390, 1393-95 (9th Cir. 1984), overruled in part, on other grounds by Public Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989),[5] which held that employment decisions based on retirement eligibility that is conditioned on attainment of a minimum age violates the ADEA. H.R. Rep. No. 101-664, at 38.

Petitioners rely on this Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) for the erroneous conclusion that the ADEA does not prohibit employment decisions based on retirement

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liability under Title VII for paying women less compensation than men because it was willing to hire women in the first place.

[5] The OWBPA was enacted to "overturn[ ] both the reasoning and holding" of the [Public Employees Ret. Sys. v.] Betts decision. S. Rep. No. 101-263, at 5 (1990). In the OWBPA's legislative history, Congress "specifically agree[d] with and reaffirm[ed]" the Ninth Circuit's holding in Borden's. Id. at 22.

eligibility. However, as explained above, Congress expressly prohibited such decisions in the OWBPA. Moreover, nothing in the Hazen Paper decision transforms age-based retirement eligibility into an age-neutral, legitimate consideration for employment decisions. The only issue resolved in Hazen Paper was "whether an employer violates the ADEA by acting on the basis of a factor, such as employee's pension status or seniority, that is empirically correlated with age." 507 U.S. at 608. This Court's holding was "simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." 507 U.S. at 613. The Court's rationale for its ruling was that "age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.' Id. at 611.

The Hazen Paper Court, however, specifically declined to extend its holding to situations where retirement eligibility is defined by a specific minimum age, 507 U.S. at 613, as is the case here. It is clear from the terms of the KRS Plan that "the employee's protected trait [here, age] actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." Hazen Paper, 507 U.S. at 610 citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) and City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702, 704-18 (1978).

Subsequent to Hazen Paper, several courts of appeals have correctly held that the ADEA prohibits denying benefits and other privileges of employment based on retirement eligibility, when such eligibility is defined by age. In Huff v. UARCO, Inc., 122 F.3d 374 (7th Cir. 1997), the Seventh Circuit found that a pension plan setting age 55 as the minimum retirement age violated the ADEA by requiring retirement eligible employees who terminated employment to accept a payout of benefits over time, while offering a lump sum payout option to those employees who were terminated but were ineligible for retirement. The Huff court explained:

> Because age is an express condition of receiving a benefit, we think that the instant case presents a close approximation of the case Hazen Paper declined to decide. Nothing in Hazen Paper prohibits a finding that UARCO's expressly age-related policy violates the ADEA . . . . This is not a case where there is merely a correlation between age and the denial of a particular benefit. UARCO's policy draws an express line between workers over fifty-five and those under.

122 F.3d at 388 (citation omitted).

In Johnson v. State of New York, 49 F.3d 75 (2d Cir. 1995), the defendant sought to hide behind Hazen Paper to avoid liability for its practice of terminating its employees after they reached the Air

National Guard's mandatory retirement age of 60. In rejecting this ploy, the Second Circuit explained,

> The State's reliance on Hazen Paper is unavailing. The flaw in the State's argument is that the decision to require dual status, with consequent mandatory retirement at 60 . . . is not merely correlated with age; unlike Hazen Paper, the employer's decision here implements an age-based criterion. Regardless of the State's reasons for requiring that certain of its civilian employees maintain ANG membership, there can be no doubt that Johnson's age "actually played a role . . . and had a determinative influence" on the decision to terminate his employment.

49 F.3d at 79-80. See also Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193, 211 (3d Cir. 2000) ("Medicare status is a direct proxy for age. This case is therefore parallel to the 'special case' mentioned by the Court in Hazen Paper, where an adverse action is taken against a person because of a particular event (i.e. approaching pension vesting) and that event in turn occurs because the person has attained a certain age.").

Similarly, in EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641 (9th Cir. 1993), the defendant union had a policy that prohibited retired union members from seeking work through the

union's hiring hall. Reaffirming its decision in Borden's, 724 F.2d 1390 (9th Cir. 1984), the Ninth Circuit correctly held that age was a "but for" cause of the plaintiffs being denied a privilege of employment since the union's policy, on its face, discriminated on the basis of a factor [retirement status] that was itself defined by age. 998 F.2d at 646.

The Ninth Circuit also held in Arnett v. Cal. Pub. Employees Ret. Sys., 179 F.3d 690 (9th Cir. 1999), cert. granted, 528 U.S. 1111, vacated on other grounds by Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000), that a plan that provided greater benefits to employees who had more "potential years of service" was facially discriminatory because "potential years of service" was "a strict function of age." 179 F.3d at 695. In this case, KRS asserts that it is permissible to "calculate disability payments based upon how far an employee is from retirement eligibility." Brief of Petitioners at 33. But because retirement eligibility is defined by a minimum age, as it was in Arnett, "how far an employee is from retirement eligibility" is just another way of saying "potential years of service." And, because "how far an employee is from retirement eligibility" is a strict function of age, the KRS plan, like the plan in Arnett, is facially discriminatory.

One other way in which this case closely resembles Arnett is the employer's justification for its facially discriminatory plan. KRS suggests that the older employees who are denied benefits have

had more "years to devote to making money, providing for [themselves] and [their] famil[ies], saving funds for retirement, and accruing years that will increase [their] retirement benefits." Brief of Petitioners at 23. In short, according to KRS, younger employees "need more of a boost." Id. In response to the identical rationale, the Ninth Circuit stated in Arnett:

> PERS further claims that the system presumes that the younger employee, having been in the workforce less time than an older hire, does not have other resources to count on, 'unlike an employee who begins work in the public sector later in life.' Not only is this wholly speculative, since many employees first enter the workforce later in life, it epitomizes precisely the sort of class-based assumptions that the Supreme Court has repeatedly rejected. See, e.g., Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (employer violates Title VII's prohibition on discrimination against individuals where employer's retirement contribution scheme assumes that women generally live longer than men).

179 F.3d at 696 (emphasis added).

Finally, the fact that some members of the ADEA's protected age group may not have been

harmed by the Petitioners' facially discriminatory policy is irrelevant. One of the cornerstones of employment discrimination law in this country is that an individual who alleges discrimination does not need to prove that all members of the statutorily protected group were discriminated against. And, the fact that the employer treated other members of the protected group favorably is also irrelevant to whether the employer discriminated against the plaintiffs. As this Court has stated, "It is clear that Congress never intended to give an employer license to discriminate against some employees . . . merely because he favorably treats other members of the employees' group." Connecticut v. Teal, 457 U.S. 446, 455 (1982).[6]

B. Because the KRS Plan is Facially Discriminatory, No Additional Proof of Discriminatory Intent is Required to Establish Liability.

As the Sixth Circuit correctly held, because of the facially discriminatory nature of the KRS plan, no additional proof of discriminatory intent was required. EEOC v. Jefferson County Sheriff's Dept., 467 F.3d 571, 581 (6th Cir. 2006). "Whether an

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[6] The Petitioners' argument that because retirement eligibility is not exclusively determined by age their plan does not violate the ADEA is equally unavailing. To prove age discrimination, an employee need not prove that age was the sole factor for the employer's acts, but must show that age made a difference. Kralman v. Illinois Dept. of Veterans' Affairs, 23 F.3d 150, 153 (7th Cir. 1994); Green v. Safeway Stores, Inc., 98 F.3d 554, 557 (10th Cir. 1996).

employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).[7] Accordingly, KRS's claims that it wasn't seeking to harm older employees but instead was only trying to provide a "boost" to younger employees who need it more than older employees is completely irrelevant to whether its policy of disqualifying retirement-eligible employees from receiving disability benefits violates the ADEA. This Court squarely addressed this issue in Manhart, 435 U.S. 702, 709 (1978) holding that the defendant's requirement that female employees make larger contributions to its pension fund than male employees, based on the fact that as a class women live longer than men, violated Title VII's prohibition of discrimination based on sex. The Court so held even though it acknowledged that the policy in question was based on notions of "fairness." Id.

Similarly, in Johnson Controls, although the defendant had a laudable reason for barring most women from lead-exposed jobs – the protection of the health of unborn children – this Court struck down the company's policy. "[T]he absence of a malevolent

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[7] See also EEOC v. Borden's, Inc., 724 F.2d at 1393 (because the employer denied severance benefits based on retirement status, the court "d[id] not require a showing of Borden's animus or ill will toward older people"); Johnson v. State of New York, 19 F.3d at 78 (same).

motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." 499 U.S. at 199. See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 129 (1985) (airline's transfer policy was discriminatory on its face, notwithstanding the fact that the airline acted reasonably and in good faith when drafting the policy).

C. The Only Defense to a Claim of Unequal Benefits Based on Age is the ADEA's "Equal Benefit or Equal Cost" Rule.

The OWBPA imposes the burden of proof on the employer to rebut a charge of age discrimination in benefits. 29 U.S.C. § 623(f)(2). The standard for determining whether unlawful age discrimination occurs in employee benefits is an objective one, specifically the "equal benefit or equal cost" standard, 29 U.S.C. § 623(f)(2)(B)(i), which requires employers "to provide equal benefits to, or to incur equal costs for benefits on behalf of, all employees." H.R. Rep. No. 101-664, at 7 (1990).

Congress specifically rejected a subjective standard focused on the employer's intent for determining whether providing unequal benefits based on age violates the ADEA. The codification of the "equal benefit or equal cost" standard replaced the subjective intent standard articulated by the Court in Public Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989). In Betts, the Court interpreted ADEA § 4(a)(1) in conjunction with the employee

benefit defense in ADEA § 4(f)(2) to "include a subjective element" that required a plaintiff to prove that the "discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." 492 U.S. at 181.

The OWBPA eliminated the subjective intent standard created by Betts for proving compliance with the ADEA in the context of a claim for unequal benefits based on age. The OWBPA specifies that the ADEA's prohibitions in § 4(a)(1) cover employee benefits and clarifies that § 4(f)(2)(B)(i) is an objective standard requiring the employer to demonstrate that it provides equal benefits to older and younger workers or to prove that any differential in benefits is due only to age-related costs. H.R. Rep. No. 101-664, at 6; S. Rep. No. 101-263, at 5.

In the face of a claim of unequal benefits based on age, the ADEA dictates that the employer's only defenses are to prove (1) equal benefits, or (2) that age-related costs justify the difference in benefits, 29 U.S.C. § 623(f)(2)(B)(i), or (3) one of the explicit safe harbors contained in 29 U.S.C. § 623(l) of the ADEA. The defenses are technical, objective standards. Thus, under the ADEA the employer's intentions in structuring a benefit or benefit plan, whether good, bad, or indifferent towards older workers, do not play any role. Indeed, during the passage of the OWBPA, Congress confirmed that an employer's motive in creating a benefit plan is irrelevant to the issue of liability under the ADEA

by adding a specific provision that benefit plans must comply with the OWBPA "regardless of the date of adoption of such system or plan." 29 U.S.C. § 623(k).[8] Accordingly, KRS's claim that it was merely trying to help younger employees who would not otherwise be eligible for retirement is unavailing to whether its plan violates the ADEA.

II. LIABILITY UNDER THE ADEA DOES NOT DEPEND ON EVIDENCE THAT THE EMPLOYER WASMOTIVATED BY INACCURATE AND STIGMATIZING STEREOTYPES CONCERNING OLDER WORKERS.

"The starting point in determining how a statute is to be applied is the language of the statute itself." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). There is no basis in the language of the ADEA to restrict its reach to employment decisions based on stereotypes. To do so would thwart the will of Congress and eviscerate the ADEA's broad protections.

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[8] This provision made it unnecessary and irrelevant to inquire into an employer's state of mind at the time the benefit was created, an inquiry the Court in Betts and United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) had made critical in determining whether the benefit plan was a "subterfuge," meaning a scheme to evade the purposes of the ADEA. In the OWBPA, Congress expressly overruled McMann as well as Betts by eliminating the term "subterfuge" from ADEA along with an inquiry into the employer's subjective motive for denying a benefit. See H.R. Rep. No. 101-664, at 45-46.

In Hazen Paper, this Court observed that, "Congress promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." 507 U.S. 610. See also EEOC v. Wyoming, 460 U.S. 226, 231 (1983) ("Although age discrimination rarely was based on the sort of animus motivating other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes."). Petitioners, and unfortunately numerous lower courts, have seized upon that observation to argue that the ADEA prohibits only discrimination based on inaccurate stereotypes. However, as Justice Scalia wrote for a unanimous Court, "[S]tatutory prohibitions often go beyond the principal evil to cover reasonable comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1988). See also Gonzales v. Oregon, 546 U.S. 242, 288 (2006) (emphasizing that this Court has "repeatedly observed that Congress often passes statutes that sweep more broadly than the main problem they were designed to address.").[9]

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[9] This Court has applied this bedrock principle in contexts other than employment discrimination. H.J. Inc. v. Northwestern Bell Telephone Co., rejected the argument that the Racketeer Influenced and Corrupt Organizations Act (RICO) should be restricted to cover only "organized crime" because Congress including findings in RICO's preamble that only focused on that problem. After reviewing the legislative

In Kimel v. Florida Bd. of Regents, this Court rejected an invitation to limit the reach of the ADEA "only to arbitrary age discrimination, which in the majority of cases corresponds to conduct that violates the Equal Protection Clause." 528 U.S. 62, 86 (2001). Instead, this Court declared that:

> The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard. The ADEA makes unlawful, in the employment context, all 'discriminat[ion] against any individual . . . because of such individual's age.' 29 U.S.C. § 623(a)(1).

Id. (emphasis added). The Court went on to pronounce that the ADEA's substantive provisions sweep so broadly that they are "at a level akin to our heightened scrutiny cases under the Equal Protection Clause." Id. at 88. And, directly relevant to this case, the Court declared that "the State's use of age [in Kimel] is prima facie unlawful." Id. at 87 citing 29 U.S.C. § 623(a)(1).

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history, this Court ruled that even though "[t]he occasion for Congress' action was the perceived need to combat organized crime. . . . Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." 492 U.S. 229, 248 (1989).

Congress may have been concerned with "inaccurate and stigmatizing stereotypes," but Congress chose to address all forms of age discrimination and adopted Title VII's prohibitions "in haec verba." Lorillard v. Pons, 434 U.S. 575 U.S. 575, 584 (1978). The ADEA's legislative history, which was the basis of the language regarding stereotypes in the Court's Hazen Paper decision, cannot revise and limit the Act's express statutory prohibitions.[10] See Zuni Pub. Schools Dist. No. 89 v. Dept. of Educ., 127 S.Ct. 1534, 1536-37 (2007); Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 83, 842-433 (1984).

In the 1965 Report, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, on which Congress drew heavily in crafting the ADEA, Secretary of Labor Willard Wirtz declared:

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[10] In City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702(1978), the Court held that even the use of stereotypes that were accurate and nonstigmatizing violated Title VII. Since the prohibitions of the ADEA and Title VII are identical, liability under either statute clearly does not depend on whether the employer is motivated by inaccurate stereotypes or accurate facts. Indeed, the ADEA prohibits an employer from denying or reducing benefits based on age, despite the fact that when it enacted the ADEA Congress was well aware of the fact that the cost of providing certain benefits to older workers can be higher than providing the same benefits to younger workers. S. Rep. No. 90-723, at 11 (1967). However, denying an employee benefit based on age, even if motivated by accurate cost data and not unfounded stereotypes, violates the ADEA unless the employer satisfies 29 U.S.C. 623(f)(2)(B)(i).

> It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

U.S. Secretary of Labor, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 21 (June 1965), reprinted in U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT. Yet, that would be the precise result if the reach of the ADEA were to be limited to discrimination motivated only by inaccurate and stigmatizing stereotypes concerning older workers.

Indeed, a review of some lower court decisions that have erroneously restricted the ADEA to such actions demonstrates the preposterous results that ensue when courts require plaintiffs to prove that the employer's discriminatory actions were on account of "inaccurate and stigmatizing stereotypes." For example, in Sperling v. Hoffmann-La Roche, Inc., 924 F. Supp. 1346 (D.N.J. 1996), there was undisputed evidence that the employer fired employees based on their "proximity to retirement" and/or whether or not they were eligible for "ample retirement benefits." 924 F. Supp. at 1388. The court ruled that this action did not violate the ADEA despite the fact that the definition of "ample retirement benefits" mandated that the employee be at least 50 years old and that "Proximity to Voluntary Retirement was defined by a two-part

test: (1) plaintiff's actual age at termination was 50 or over and (2) plaintiff's number of years of remaining employment was less than 8 years, determined by subtracting plaintiff's age from his or her regular retirement age of 65. Id. n. 25.

Astoundingly, the court ruled that although both proximity to retirement and eligibility for retirement benefits were functions of age, the employer's decision to target individuals for its reduction-in-force if they met either definition did not violate the ADEA. The court explained its holding by saying that there was no evidence that the decisions to target older employees for the reduction-in-force "were based on denigrating stereotypes about older workers. Rather, the testimony suggests that the managers were using proximity to retirement and eligibility for retirement benefits as a means to minimize the effect that [the reduction-in-force] would have on [the employer's] employees" Id. at 1390. Indeed, one manager admitted that he believed one of the older workers he fired based on eligibility for retirement benefits was "better in the performance of his job," than younger workers who were retained, "but we felt that he would be the least hurt by being let go because he was somewhat near retirement anyway." Id. n. 27. Clearly, requiring evidence of "inaccurate and stigmatizing stereotypes" deprived that older worker of the ADEA's promise that he be judged "based on [his] ability rather than age . . . ." 29 U.S.C. § 621(b).

As this decision aptly demonstrates, if this Court engrafts a new criterion of proof onto the ADEA that an employer must be motivated by "inaccurate or stigmatizing stereotypes" about older workers before they can be found liable, we will be returned to the era when mandatory retirement was lawful in this country. Employees who reach the minimum age for retirement benefits will be vulnerable for termination with no recourse available to them. The ADEA's express prohibition of age discrimination will become less and less effective because employers will be free to eliminate older workers so long as their stated rationale for doing so does not implicate stereotypes about older workers.

Another decision illustrates how requiring age discrimination victims to prove that the employer was motivated by stereotypes about older workers will turn back the clock to the time when maximum hiring ages, one of the evils the ADEA was enacted to address, and has in fact eliminated were commonplace. In Dilla v. West, 4 F. Supp. 2d 1130 (M.D. Ala. 1998), aff'd per curiam, 179 F.3d 1348 (1999), it was undisputed that the plaintiffs were not hired as air traffic controllers "based upon an assessment of the years remaining before each candidate became eligible for retirement." Id. at 1141. The court addressed what it considered to be a "difficult legal question . . . whether consideration of the candidates' retirement eligibility status . . . constituted age discrimination under the ADEA because one cannot consider that status without taking into account the candidates' ages." Id.

Remarkably, the court ruled that despite the fact that the employer refused to consider the plaintiffs for employment because of their retirement eligibility which was "inextricably linked" with age, id. at 1142, the plaintiffs did not establish that they were denied employment because of their age because they failed to show that the employer "exploited the perfect . . . correlation between retirement or pension status and age to mask his true reliance on age and age-based stereotypical thinking." Id.

Prior to the ADEA's enactment in 1967, approximately half of all private job openings explicitly barred applicants over age fifty-five and a quarter barred those over forty-five. 113 Cong. Rec. 1089-90 (Jan. 23, 1967). If this Court accepts the Petitioners' invitation to limit the scope of the ADEA's prohibitions to actions motivated by "inaccurate or stigmatizing stereotypes" about older workers, those job advertisements may be replaced with employers simply refusing to hire any applicant whose age is relatively close to their retirement plan's minimum eligibility age. If the hiring criterion was challenged, the employer would need only assert that it did not refuse to hire older workers because of concerns about age-related declines in productivity (the prohibited stereotype), but instead was legitimately concerned that the older workers might leave upon reaching retirement age. If this Court condones such an extremely narrow interpretation of the ADEA, the potential experience, energy, and dedication that older workers bring to the work place will once again be

extinguished by that "harsh[ ] verdict . . . that they are no longer worth their keep . . . when the answer at the hiring gate is "You're too old." THE OLDER AMERICAN WORKER at 1.

Congress addressed this problem forty years ago when it enacted the ADEA and prohibited all forms of discrimination "because of . . . age," 29 U.S.C. § 623(a)(1), and did not limit the scope of the Act to decisions motivated by age-based stereotypes. Congress should not have to do so again because of the misguided actions by lower courts to limit the ADEA's plain and unambiguous language based on this Court's observation that Congress was concerned about "inaccurate and stigmatizing stereotypes." Hazen Paper, 507 U.S. at 610.

In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 357 (1995), a unanimous Court emphasized that the ADEA "reflects a societal condemnation of invidious bias in employment decisions . . . [that is] part of a wider statutory scheme to protect employees in the workplace nationwide." This strong language belies the Petitioners' attempt to limit the reach of the ADEA to stereotypical thinking alone. To the contrary, the ADEA is a broad remedial statute and should be construed liberally in order to further its purposes. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765-66 (1979) (Blackman, J. concurring); see also Thurston, 469 U.S. at 120 quoting Lorillard v. Pons, 434 U.S. 575, 577 (1978) ("The ADEA 'broadly prohibits arbitrary discrimination in the workplace based on age.'").

CONCLUSION

For the foregoing reasons, amici AARP and NELA respectfully submit that the judgment of the Unites States Court of Appeals for the Sixth Circuit should be affirmed.

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In the Supreme Court of the United States

Kentucky Retirement Systems, Commonwealth of Kentucky, and Jefferson County Sheriff's Department.
Petitioners,

v

Equal Employment Opportunity Commission.
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF MICHIGAN, ALASKA, ARKANSAS, COLORADO, DELAWARE, IDAHO, MARYLAND, MINNESOTA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE AND TEXAS AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The State of Kentucky's public employee retirement statutes include normal and disability retirement benefits. Under Kentucky's retirement plan a member is eligible for normal retirement benefits after 20 years of service or at age 55 with five years of service. A disability retirement is designed to replace a normal retirement if the member becomes disabled and can no longer work and is not yet eligible for a normal retirement. However, a member who is eligible for a normal retirement may not receive a disability retirement. In calculating Kentucky's disability retirement benefit, it is assumed that the member would have worked for 20 years, or to the normal retirement age of 55, whichever occurs first. Up to 10 years of imputed service credit can be added to the actual years of service. The disability retirement benefit is calculated using actual years of service plus any imputed service credit so that the amount of the disability retirement is approximately equal to the amount the employee would have received upon normal retirement.

The question presented is:

Whether any use of age as a factor in a disability retirement plan is "arbitrary" and thus renders the plan facially discriminatory under a disparate treatment theory of recovery in violation of the Age Discrimination in Employment Act.

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INTEREST OF THE AMICUS CURIAE

Under Kentucky's retirement plan a member is eligible for normal retirement benefits after 20 years of service or at age 55 with five years of service. A disability retirement is designed to replace a normal retirement if the member becomes disabled and can no longer work and is not yet eligible for a normal retirement. However, a member who is eligible for a normal retirement may not receive a disability retirement. In calculating Kentucky's disability retirement benefit, it is assumed that the member would have worked for 20 years or to the normal retirement age of 55, whichever occurs first. Up to 10 years of imputed service credit can be added to the actual years of service. The disability retirement benefit is calculated using actual years of service plus any imputed service credit so that the amount of the disability retirement is approximately equal to the amount the employee would have received upon normal retirement.

Michigan and the undersigned States are concerned that the decision of the Court of Appeals,[1] which found that Kentucky's plan[2] was discriminatory, will adversely impact their ability to apply their existing retirement statutes that best meet their respective needs and the needs of their employees. Consequently, they file this amicus brief asking this Court to reverse the Court of Appeals.

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[1] *Equal Employment Opportunity Commission v Jefferson County Sheriff's Department, Kentucky Retirement Systems and the Commonwealth of Kentucky*, 467 F 3d 571 (CA6 2006).

[2] *KRS* 16.505 et seq., *KRS* 61.510 et seq., and *KRS* 78.510 et seq.

STATEMENT

The Equal Employment Opportunity Commission (EEOC) brought this action against Kentucky Retirement Systems, the Jefferson County Sheriff's Department and the Commonwealth of Kentucky (Petitioners) alleging that the eligibility requirements and the manner in which disability benefits are calculated under Kentucky's statutes violate the Age Discrimination in Employment Act (ADEA).[3] The EEOC asserted that the Kentucky statutes were facially discriminatory because age was considered a factor in determining benefits. The Court of Appeals, sitting en banc, held that Kentucky's retirement plan was facially discriminatory because it excluded those employees who were over 55 years of age from receiving a disability retirement because they were eligible for a normal retirement.[4] In addition, the Court found that Kentucky's statutes were facially discriminatory because employees younger than 55 receive disability retirement benefits that are less than even younger employees simply because of their age.[5] The Court of Appeals reached these conclusions without determining whether Kentucky's retirement plan was arbitrary.

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[3] Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq.*

[4] *Equal Employment Opportunity Commission*, 467 F 3d at 579.

[5] *Equal Employment Opportunity Commission*, 467 F 3d at 579-580.

SUMMARY OF ARGUMENT

The Court of Appeals erred when it concluded that Kentucky's statutes violated the ADEA. The ADEA was enacted by Congress to prohibit employers from terminating older workers for no reason except their age and from refusing to hire older workers simply because of their age. Kentucky's retirement statutes do neither of these. Instead, they seek to ensure that all public employees in Kentucky, regardless of their age, are provided a benefit when they are no longer able to work. Because Kentucky's retirement statutes use other reasonable factors besides the age of the employee to determine the benefit to be given to disabled employees, the Kentucky statutes do not violate the ADEA.

ARGUMENT

I. The Kentucky retirement plan does not violate the Age Discrimination in Employment Act.

In 1964, Congress requested the Secretary of Labor Willard Wirtz to complete a study of the factors that might tend to result in discrimination in employment because of age and to recommend legislation to "prevent arbitrary discrimination in employment because of age." (Wirtz Report)[6] The report from Secretary Wirtz noted that arbitrary discrimination results from certain age limits.[7] Moreover, the report observed that "institutional arrangements . . . indirectly restrict the employment of older workers."[8] In addition, the report defined arbitrary age discrimination as "assumptions about the effect of age on [an employee's] ability to do a job when there is in fact no basis for these assumptions."[9]

After the report was received, Congress held extensive hearings.[10] The testimony at the hearings "dwelled on unjustified assumptions upon the effect of age on the ability to work."[11] The comments of Representatives and Senators centered on the

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[6] 78 Stat 265 § 715; Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment, 5-6 (June 1965) reprinted in U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act 22-23 (1981) (Wirtz Report).

[7] Wirtz Report, p 2.

[8] Wirtz Report, p 15.

[9] Wirtz Report, p 2.

[10] *General Dynamics Land Systems, Inc. v Cline, et al*, 540 US 581, 587-588 (2004).

[11] *General Dynamics*, 540 US at 588.

prevention of discrimination against older workers who wanted to work.[12]

This Court has held that the ADEA was enacted as a result of the Wirtz Report.[13] When the ADEA was enacted, Congress set forth its findings and its purpose for passing the statute. The findings stressed that older workers were at a disadvantage in retaining a job and in regaining employment due to arbitrary age limits that restricted a person's right to work.[14] As a result, Congress stated that the purpose of the ADEA was to[15]:

> promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. [Emphasis added]

As this Court has stated[16]:

> Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

This Court has also stated that "arbitrary age discrimination" refers to the Wirtz Report's finding that employers have age limitations on new hires i.e., those over age 45, without consideration of the applicants'

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[12] *General Dynamics*, 540 US at 588-589.
[13] *Smith v City of Jackson*, 544 US 228, 232-233 (2005).
[14] *General Dynamics*, 540 US at 589.
[15] 29 USC 621(b). (Emphasis added).
[16] *Hazen Paper Company v Biggins*, 507 US 604; 610 (1993).

other qualifications.[17] As a result, this Court has held that[18]:

> The ADEA's ban on "arbitrary limits" thus applies to age cases that exclude older applicants, necessarily to the advantage of younger ones."

The Kentucky retirement statutes do not violate the ADEA because they are neither contrary to the purpose of the ADEA nor do they arbitrarily discriminate against a public employee covered by the retirement plan based upon the employee's ability to do a job. Moreover, the Kentucky plan is not arbitrary because it does not place an age limit on when someone can be hired or when someone must be terminated. Instead, the retirement plan provides a benefit to employees when they can no longer perform their jobs, regardless of age. In other words, any employee who can no longer work receives either a disability retirement or a normal retirement, both of which are calculated in the same manner, except it is assumed that the disabled member would have continued working until normal retirement age.

The Court of Appeals viewed the EEOC's claim as one of disparate treatment discrimination. Under a disparate treatment theory, the employer "simply treats some people less favorably than others because of" their age.[19] However, in *Hazen Paper v Biggins*, this Court held that "there is no disparate treatment under the

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[17] *General Dynamics*, 540 US at 590.

[18] *General Dynamics*, 540 US at 590. See also *Smith*, 544 US at 255, O'Connor, Jr., concurring (concluding that the Wirtz Report's definition of "arbitrary" "clearly equates with disparate treatment" that is "intentional and unfounded").

[19] *Hazen Paper Company*, 507 US at 609.

ADEA when the factor motivating the employer is some feature other than the employee's age."[20] The employee's age is not the motivating factor in Kentucky's retirement plan.

The factor motivating Kentucky in its retirement plan is to provide a similar level of protection to all members regardless of age. Indeed, the effect of Kentucky's retirement plan and its ability to ensure a benefit to all covered employees is age neutrality. Kentucky reaches this goal by providing retirement protection to an employee who either retires after attaining sufficient service and age benchmarks or who cannot work due to disability. If the employee already qualifies for a normal retirement due to age and years of service, then the goal of providing retirement protection is achieved and there is no reason to have that person apply for a disability retirement.

The facts establish that Mr. Lickteig became disabled when he was 61years old after 17 years of service. He was not given service disability credit of 20 years because he was already eligible for a normal retirement benefit after 17 years of service. As noted, the overriding purpose of Kentucky's retirement plan is to ensure that a benefit is provided to employees who either become disabled and can no longer work or who have worked long enough to become eligible for a benefit under a normal retirement. Here, that purpose was met since Mr. Lickteig was eligible for a normal retirement.

The Court of Appeals held that the Kentucky plan discriminated against Mr. Lickteig because he was not eligible for a disability retirement since he was over 55

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[20] *Hazen Paper Company*, 507 US at 609.

years old.[21] But, Mr. Lickteig was eligible for a normal retirement, a fact that the Court of Appeals failed to properly consider. Moreover, someone like Mr. Lickteig, who was 61 years old when he became disabled, was not similarly situated to a 40-year-old who becomes disabled, assuming they each had 17 years of service. The 40-year-old could have worked more years than Mr. Lickteig. Thus, a disability benefits system giving a 40-year-old three more years of service credit to reach 20 was not arbitrary because the benefit entitlement was related to, but not determined by age.[22]

The critical factor in Kentucky's statutes is how many years a person has worked before becoming disabled, not the age at the time of disability. Indeed, there are situations under Kentucky's plan when an older disabled employee would receive more service credit than a younger employee. For example, if one employee is 40 years old with 10 years of service and the other is 38 years old with 15 years of service, the 40-year-old will be credited with 10 years of service while the 38-year-old will be credited with only 5 years of service. Moreover, the age of the employee may not even be relevant. For example, every employee with 20 years of service who becomes disabled receives a normal retirement allowance regardless of age. Thus, in Kentucky's plan, age is *not* the motivating factor and therefore the plan does not violate the ADEA.

This Court has held in a disparate treatment case that "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact

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[21] *Equal Employment Opportunity Commission*, 467 F 3d at 579.
[22] *Lyon v Ohio Education Ass'n a Professional Staff Union*, 53 F 3d 135, 137, 140-141 (6th Cir 1995).

of differences in treatment."[23] But here there is no proof of discriminatory motive in Kentucky's retirement statutes. The retirement plan simply provides that a person who has earned a normal retirement is not eligible to receive a disability retirement. That determination is based on years of service, not age. As this Court held in *Hazen*, "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service."[24]

This Court's decision in *Smith v City of Jackson* is instructive.[25] In *Smith* the city gave a higher percentage pay raise to police officers with less than 5 years of service than to other police officers. Most police officers with more than 5 years of service were older. These officers sued, claiming that they were discriminated against because of their age. This Court held that the ADEA does not prohibit action where the differentiation in treatment was based on reasonable factors other than age discrimination.[26] The Court found that the difference in the percentage of pay increase was reasonably related to the City's "perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market."[27] As a result, this Court affirmed the dismissal of the plaintiff's complaint.

Likewise, Kentucky's disability retirement statutes are based on permissible factors. They are intended to

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[23] *Teamsters v United States*, 431 US 324, 335, n15 (1977) quoted with approval in *Hazen Paper Company*, 507 US at 609.

[24] *Hazen Paper Company*, 507 US at 613.

[25] *Smith v City of Jackson*, 544 US 228 (2005). *Smith* was a disparate impact case, but the same analysis applies in the present disparate treatment context.

[26] *Smith*, 544 US at 238, 241.

[27] *Smith*, 544 US at 242.

ensure a benefit to employees who have not worked long enough to be eligible to receive a normal retirement but who can no longer work due to injury. They are not intended to discriminate against older workers. Instead their purpose is to guarantee that a covered employee will receive some benefit if the employee cannot work, regardless of his or her age. Kentucky's plan has no connection with the kind of discrimination Congress intended to prohibit in the ADEA—discrimination against older workers who are seeking a job or who wish to retain their job. Instead, Kentucky's retirement plan is an attempt to assist employees who can no longer perform their job due to a disability. This Court should reverse the decision of the Court of Appeals.

II. The Court of Appeals decision could have substantial adverse consequences in other States.

The Court of Appeals' decision could have substantial adverse implications for the retirement systems of many States that have retirement statutes. This is because the Court of Appeals has held that a retirement statute that merely uses age as one of the factors to determine the eligibility and amount of a particular benefit is subject to challenge on the basis that it is discriminatory. The Court of Appeals decision sweeps aside the reasoned decision of the Kentucky Legislature whose retirement statutes, like the retirement plans enacted by other States for their respective public employees, were enacted to meet the particular needs of their governmental employees and the State.

What the Court of Appeals failed to recognize is that *all* retirement benefits are not equal among *all* employees. In Kentucky, as in most States, the more

years that a person works and the higher a person's salary, the larger the person's pension will be. A 60-year-old could have worked for 30 years at a secretarial position and not receive as much in retirement as a 55-year-old department director with only 10 years of service. This does not mean that the statute discriminates against the 60-year old employee. It only means that other factors such as years of service and pay rate also determine a retirement amount.

In the case of Mr. Lickteig, while he did not receive a "full" disability retirement benefit of 20 years, he nonetheless is eligible to receive a normal retirement benefit due to a combination of his age and his years of service. Mr. Lickteig has not suffered age discrimination with respect to his desire to work or his eligibility to receive a benefit. Rather, the purpose of Kentucky's statutes, which is to ensure that those who become disabled receive a benefit, was fulfilled. Neither that purpose nor Kentucky's method of achieving that purpose in its retirement plan, violates the ADEA, which was intended to prevent employers from arbitrarily terminating older workers or refusing to hire older workers simply due to their age.

Many States, such as Michigan, have a constitutional prohibition against the impairment or diminution of governmental pension allowances.[28] If the Court of Appeals decision is not reversed, these States may be forced to enact major revisions to their retirement statutes. This might be very difficult to do without violating the constitutional prohibition, unless the States

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[28] Const 1963, art 9, § 24; *Seitz v Probate Judges Retirement System*, 189 Mich App 445, 449-451; 474 NW2d 125 (1991) app den 439 Mich 946; 482 NW2d 459 (1992) reconsideration den 483 NW2d 898 (1992).

increase the benefits of those individuals like Mr. Lickteig. This increase could cost millions of dollars nationwide and could further weaken the economic viability of retirement funds that may already be underfunded. Congress never intended the ADEA to have this result.

CONCLUSION

The opinion of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the use of an age classification in a disability-retirement plan automatically evidences discriminatory intent sufficient to establish a prima facie case of arbitrary age discrimination.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] As public employers, *amici* have an especially strong interest in legal issues that affect their ability to manage their workforces.

Amici condemn invidious age-based discrimination against workers over the age of forty. Indeed, the States were at the forefront in banning arbitrary age-based discrimination. *See* U.S. Sec'y of Labor, *The Older American Worker: Age Discrimination in Employment* 9 (1965). *Amici* thus fully recognize the need for remedies to address intentional age discrimination.

In contrast, the issue in this case—whether the use of an age distinction to determine eligibility for disability retirement benefits is by itself sufficient to establish a prima facie case of arbitrary discrimination—raises the troubling prospect that public employers will be subject to prolonged discovery and trial even when they use benign employment policies that further the ADEA's core purpose of "promot[ing] employment of older persons." 29 U.S.C. § 621(b). The court of appeals' decision thus punishes petitioners for engaging in precisely the employment practices that the ADEA promotes.

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

There is no evidence of discriminatory intent in Kentucky's use of age as a factor in its retirement plan. The en banc court of appeals erroneously fixated on the presence of an explicit age distinction for retirement eligibility and held that distinction sufficient to establish the "intent" element of a prima facie case of disparate treatment. Such mechanical and superficial analysis falls short of the standards set by this Court and the court of appeals itself for determining whether a prima facie case is established. The judgment below should be reversed and the case dismissed.

1. Use of an age distinction cannot establish a prima facie case of disparate treatment age discrimination unless it creates a genuine inference of discriminatory intent. Inferring that an employer has acted with an invidious motive is a process of reasoning by which a court reaches a tentative conclusion after carefully examining the relevant evidence. As this Court explained in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), "[a] prima facie case . . . raises an inference of discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors." Moreover, "we are willing to presume this largely because we know *from our experience* that more often than not people do not act in a totally arbitrary manner,

without any underlying reasons, especially in a business setting." *Id.*

This Court has expressly cautioned against drawing inferences of invidious discrimination based on insufficient evidence. Although a prima facie case can "theoretically" be constituted on the basis of "very thin evidence," such low-grade evidence does not support the requisite inference as a matter of fact. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

Furnco and *O'Connor* thus militate against any mechanical conclusion that a plaintiff has met the burden of producing evidence of intent to discriminate based on age. Yet this is precisely what the en banc court did in this case. By concluding that the use of an age distinction in a retirement plan automatically evidences discriminatory intent, the court disregarded not only this Court's teachings but three decades of its own ADEA precedents. *See, e.g.*, *Laugesen v Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); *Rowan v. Lockheed Martin Energy Sys.*, 360 F.3d 544 (6th Cir. 2004).

The legislative history of the ADEA likewise confirms that mechanical inferences of intentional age discrimination are inappropriate. The House Report counsels that "[t]he case by case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions." H.R. Rep. No. 90-805 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2220.

The House Report further specifies that the ADEA was not intended to disrupt arrangements that

already comported with the Act's purpose. It is therefore troubling that the EEOC has elected to challenge a policy that facilitates the hiring of older workers, the core purpose of the ADEA, as set forth in 29 U.S.C. § 621(b).

2. Kentucky's use of an age distinction to determine retirement eligibility is clearly not the product of discriminatory intent, nor does it result in discriminatory treatment of "similarly situated" older law enforcement officers. The plan therefore evidences no unlawful age discrimination and the EEOC failed to establish a prima facie case of disparate treatment.

Age distinctions do not violate the ADEA unless they are drawn "because of" age. This Court has stressed that the ADEA requires a causal connection between discriminatory intent and any alleged adverse treatment. This Court has held that employers do not violate the ADEA where an age-related factor, but not age itself, is the motivation for the employer's decision. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

A line based on age, unlike one based on race, can be drawn for valid reasons related to age rather than because of age itself. For example, the Court has ruled that the Equal Protection Clause is not violated by a state law that requires law enforcement officers to retire at age 50. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). Such a law, the Court held, was rationally related to the State's interest in "protect[ing] the public by assuring physical preparedness of its uniformed police." *Id.* at 314.

Moreover, in 1996 Congress sanctioned the use of an age distinction pertaining to public safety service by amending the ADEA to permit state and local governments to make age 55 a mandatory retirement age for firefighters and law enforcement officers. 29 U.S.C. § 623(j). Far from having such a mandatory retirement age, petitioner Jefferson County gives officers the option of retiring at age 55 (or after 20 years of service), or continuing to work, as complainant Lickteig elected to do. It is at the least ironic that the County's policy of allowing officers to continue to work beyond retirement has resulted in the EEOC's claim of invidious age discrimination.

Were Kentucky to set a mandatory retirement age of 55 there could be no dispute that the same age classification Kentucky now uses to determine disability retirement would be nondiscriminatory under the ADEA. This is because an officer who is retired at 55 would not have the "opportunity" to become permanently disabled at an age when the plan offers normal retirement benefits rather than disability retirement benefits, and thus could not allege disparate treatment in comparison to a younger permanently-disabled officer.

The Kentucky retirement plan is designed to provide hazardous-duty personnel who become permanently disabled before they qualify for normal retirement with a retirement benefit that is similar to what they would have earned had they worked up to the earliest milestone of retirement eligibility. Without the use of the normal retirement age as a factor in the calculation of benefits, it would be impossible to project what an officer would have earned had she not become disabled.

Not only is the plan based on benign motives, the plan does not adversely affect older workers. The plan is a form of insurance that provides officers with two related but distinct benefits: (1) the peace-of-mind benefit that comes from the assurance of income support in the event that the officer becomes permanently disabled prior to reaching retirement age; and (2) the compensation benefit of the income support itself if and when a contingency, whether it is permanent disability or retirement, occurs. An officer who reaches normal retirement age without becoming disabled is no less insured against the contingency of permanent disability during her pre-retirement service than a homeowner with fire insurance whose house does not burn down. No one could rationally argue that either the pre-retirement officer or the homeowner would be "better off" if the contingency occurred.

Yet the EEOC's claim of intentional age discrimination says for all intents and purposes just that. It is based on the difference in compensation for post-retirement-age officers and those who become permanently disabled prior to retirement age. This simplistic notion disregards the reality that the EEOC represents a class of officers who have already enjoyed the full peace-of-mind benefits conferred by disability coverage, and are now seeking to capture a surplus of compensation benefits under the theory that the same plan that once afforded them peace-of-mind benefits is now "unequal."

The Kentucky plan is also nondiscriminatory because an officer who elects to work past age 55 is not facially excluded from any risk coverage. There is no risk for which younger officers are protected and

older officers are not. The plan does not exclude older officers from the receipt of retirement benefits in the event of a disability that prevents them from continuing to work. While post-retirement-age officers such as Lickteig are especially susceptible to age-related disabilities, the plan's normal retirement benefit assures them of coverage if and when their disability results in retirement.

The en banc court of appeals' ruling that the EEOC has made out a prima facie case of intentional age discrimination is thus irreconcilable with both this Court's cases and common sense. Because the nondiscriminatory nature of Kentucky's plan is clear, no inference of discriminatory intent can be drawn and the judgment below should be reversed.

ARGUMENT

Both the district court and a panel of the court of appeals correctly ruled that the EEOC failed to establish a prima facie case of disparate treatment age discrimination because there is no evidence of discriminatory intent in Kentucky's use of age as a factor in its retirement plan. The en banc court of appeals erred in reversing.

In its analysis, that court fixated on the presence of an age distinction for retirement eligibility and disregarded the obvious: that the purpose of the plan is to "provide[] that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service." Pet. App. 33a (Boggs,

J., dissenting). The functional effect of the court's decision is to render all explicit age distinctions in retirement plans presumptively unlawful, even where, as here, the plan clearly does not discriminate "because of . . . age." 29 U.S.C. § 623(a).

The analysis and holding of the en banc court are erroneous. That court itself has repeatedly acknowledged that "Congress did not desire that the [ADEA] be applied formalistically." *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 n.4 (6th Cir. 1975). In particular, because "the nature of age discrimination [is] quite different from discrimination based upon the classes protected by Title VII," Pet. App. 12a, "it [is] inappropriate simply to borrow and apply the [*McDonnell Douglas*] guidelines automatically" in ADEA cases. *Laugesen*, 510 F.2d at 312.

Although this fundamental error alone suffices for reversal, there is more. By forcing petitioners to go through years of discovery and possibly a trial on a patently baseless claim of intentional age discrimination, the en banc court and the EEOC are punishing Jefferson County for doing precisely what Congress intended when it enacted the ADEA—providing meaningful employment to older workers. *See* 29 U.S.C. § 621(b).

Because its analysis of the EEOC's claim of intentional age discrimination falls well short of the standard for establishing a prima facie case and defeats the primary affirmative purpose of the ADEA, the judgment of the court of appeals should be reversed.

I. THE USE OF AN AGE DISTINCTION IN A DISABILITY RETIREMENT PLAN DOES NOT AUTOMATICALLY ESTABLISH A PRIMA FACIE CASE OF INTENTIONAL AGE DISCRIMINATION.

The use of an age distinction cannot establish a prima facie case of disparate-treatment discrimination unless it creates a genuine inference of discriminatory intent. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). As this Court explained in *Furnco Constr. Corp. v. Waters*,

> A prima facie case . . . raises an inference of discrimination only because we presume these acts, *if otherwise unexplained, are more likely than not based on the consideration of impermissible factors*. And we are willing to presume this largely because we know *from our experience* that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

438 U.S. 567, 577 (1978) (emphasis added) (citation omitted).

Accordingly, inferring discriminatory intent is not simply a mechanical exercise. Rather, it is a process of reasoning by which a tentative conclusion is reached only after an examination of the relevant evidence—informed by what *Furnco* judiciously described as "experience." *See Black's Law Dictionary* 778 (6th ed. 1991) (inference is a "process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted"); *Webster's Third New International Dic-*

tionary 1158 (1976) (inference is "the act of passing from one or more propositions, statements, or judgments considered as true to another the truth of which is believed to follow from that of the former").

Furnco thus militates against the use of per se rules to establish a prima facie case of intentional age discrimination. By concluding that the use of an age distinction in a retirement plan automatically evidences discriminatory intent, the en banc court disregarded this Court's teachings as well as that court's own long line of precedents beginning with *Laugesen*, 510 F.2d at 307 (6th Cir. 1975).[2]

As a consequence, the court also disregarded a critical distinction between race and age. While "experience" may well support an inference of discriminatory intent from the use of any racial distinction in employment, it likewise counsels that the same inference by no means automatically arises from the use of an age distinction. This is particularly true in retirement plans, where consideration of age must account for two realities: First, "all retirement plans necessarily make distinctions based on age." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 207 (1977) (White, J., concurring in the judgment). Second, advancing age does not describe an immutable quality or a discrete class, but rather "marks a stage that each of us will reach if we live out our normal span." *Massachusetts Bd. of Retire-*

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[2] A Shepard's check of *Laugesen* conducted on Nov. 1, 2007, determined that this Sixth Circuit decision has been cited 318 times since it was handed down in 1975. *Laugesen* was followed most recently for its interpretation of the ADEA's legislative history by the Sixth Circuit in *Rowan v. Lockheed Martin Energy Sys.*, 360 F.3d 544, 548 (6th Cir. 2004).

ment v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam).

Moreover, this Court has expressly cautioned against drawing inferences of invidious age discrimination based on insufficient evidence. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996), the Court noted that a prima facie case could "theoretically" be constituted "on the basis of very thin evidence—for example, the replacement of a 68-year-old by a 65-year-old." The Court emphasized, however, that this inference would be unfounded because "the prima facie case requires *evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . .*" *Id.* (internal quotations marks omitted). Thus, "[i]n the age discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger." *Id.* at 313.

Likewise, using age as one factor in a retirement plan is, by itself, very thin evidence that is inadequate to create an inference that the plan was based on discriminatory intent. When, as here, an age distinction is used in a benign plan that provides both disability and normal retirement benefits to all participants, it is patently insufficient to create a prima facie case of invidious age discrimination.

The legislative history confirms that mechanical inferences of intentional discrimination are incompatible with the ADEA. With the understanding that "not all age discrimination [in employment] is 'arbitrary,'" U.S. Sec'y of Labor, *The Older American Worker: Age Discrimination in Employment* 1 (1965),

the House Report counsels that "[t]he case by case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions." H.R. Rep. No. 90-805 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2220, *quoted in Laugesen*, 510 F.2d at 312 n.4. *Accord, e.g.*, *Rowan*, 360 F.3d at 548-49 (6th Cir. 2004) ("[T]he legislative history of the [ADEA] counsels against reading the statute as forbidding any consideration of age under any circumstances.") (citing and quoting *Laugesen*); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1118 n. 3 (6th Cir. 1980). *See also General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 586-87 (2004) ("Congress chose not to include age within discrimination forbidden by Title VII . . . being aware that there were legitimate reasons as well as invidious ones for making employment decisions on age.").

The House Report further specifies that the ADEA was not intended to disrupt arrangements that comported with the ADEA's purpose. Recognizing that certain industries already employed a disproportionately high number of older workers, the Report explained that the ADEA was not intended to "worsen a situation such as this, or to prevent an employer from achieving a reasonable age balance . . . . It is expected that the Secretary will recognize these particular situations and treat them according to their individual merits on a case by case basis." H.R. Rep. No. 90-805, *as reprinted in* 1967 U.S.C.C.A.N. at 2219-20, *quoted in Laugesen*, 510 F.2d at 312 n.4.

It is therefore disturbing that the EEOC has elected to challenge a policy that facilitates the hiring of older workers—the very raison d'etre of the Act. *See* 29 U.S.C. § 621(b). Under Kentucky's plan, a hazardous-duty officer hired at age 49 who becomes disabled at age 54 may receive a lower payout from disability retirement than an officer hired at 35 who becomes disabled at 40,[3] but the important point, lost on the court below, is that the older worker was both hired and covered under the disability-retirement plan.

Condemning this result as impermissible discrimination, particularly in a field like law enforcement that depends upon steady recruitment of new officers, would invite the problem of arbitrary age discrimination that Congress sought to remedy in the first place. As explained in the dissent below,

> [Kentucky's] very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated plaintiff's "problem." Those most "disadvantaged" are those who were oldest at the time of hiring. It would be contrary to the letter, as well as the spirit, of the ADEA to penalize the employer for the incidental ramifications of objectivity.

Pet. App. 37a (quoting *Lyon v. Ohio Ed. Assoc. & Prof'l Staff Union*, 53 F.3d 135, 140 n.6 (6th Cir. 1995)).

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[3] In this example, the 54-year-old receives one year of service credit imputed to his calculation of benefits, while the 40-year-old receives five years of service credit. *See* Pet. Br. 7a.

II. BECAUSE KENTUCKY'S USE OF AN AGE DISTINCTION IS NONDISCRIMINATORY, IT CANNOT SUSTAIN A PRIMA FACIE CASE OF AGE DISCRIMINATION.

Because "all retirement plans necessarily make distinctions based on age," *McMann*, 434 U.S. at 207 (White, J., concurring), and not all these distinctions are "because of . . . age," 29 U.S.C. § 623(a)(1), the mere use of an age distinction in a retirement plan does not evidence discriminatory intent.

In this case, Kentucky's use of an age distinction to determine retirement eligibility is clearly not the product of discriminatory intent. Furthermore, Kentucky's use of an age distinction does not result in adverse treatment for similarly situated older law enforcement officers. The plan therefore evinces no unlawful discrimination. Because the EEOC failed to proffer evidence of discriminatory intent in support of its claim of invidious age discrimination by petitioners, it failed to establish a prima facie case and this case ought to have been dismissed in its early stages.

A. A Retirement Plan May Explicitly Use Age as a Factor Without Doing So "Because of" Age.

Age distinctions do not violate the ADEA unless they are drawn "because of" age. This Court has stressed that the ADEA requires a causal connection between discriminatory intent and any alleged adverse treatment. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("In a disparate treatment case, liability depends on whether [age] actually motivated

the employer's decision."); *see also Smith v. City of Jackson*, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring) (§ 4(a)(1) "plainly requires discriminatory intent, for to take an action against an individual '*because of* such individual's age' is to do so 'by reason of' or 'on account of' her age"). Consequently, the Court has unequivocally held that employers do not violate the ADEA where an age-related factor, but not age itself, is the motivation for the employer's decision.

In *Hazen Paper*, for example, the Court held that the employer did not engage in disparate treatment under the ADEA when it terminated a 62-year-old employee before his pension vested. The Court reasoned that "even if the motivating factor is correlated with age, as pension status typically is," there is no disparate treatment under the ADEA if the motivating factor is not age itself. *Id.* at 611.

To be sure, the explicit use of age in a retirement plan signifies that the motivation for drawing the distinction is *related* to age. But as *Hazen Paper* instructs, this is not enough to demonstrate that the distinction itself has been drawn *because of* age.

Despite this Court's guidance, the en banc court concluded that Kentucky's retirement plan "categorically excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age." Pet. App. 16a. Yet, even assuming that the court was correct in finding that employees over age 55 are excluded from a material

retirement benefit,[4] the court never explained how or why the asserted differential treatment was "because of" age. Such conclusory analysis would suffice only if the existence of an age distinction is in and of itself equivalent to *the reason for* its existence—a classic tautology.

In fact, a line based on age, unlike one based on race, can be drawn for valid reasons related to age rather than because of age itself.[5] For example, in *Massachusetts Bd. of Retirement v. Murgia*, this Court held that a mandatory retirement policy for state police officers over age 50 was constitutional because it was rationally related to Massachusetts' legitimate interest in "protect[ing] the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314. In so holding, the Court noted that "the primary function of the [police] is to protect persons and property and maintain law and order," and that "even [appellee's] experts concede[d] that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." *Id.* at 310-11 (internal quotation marks omitted).

Although *Murgia* involved an equal protection challenge rather than an ADEA challenge, the Court's refusal to treat age as a suspect class suggests that, unlike race or gender, the category of

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[4] This assumption is wrong because older workers are not adversely treated by Kentucky's plan, as explained at pp. 19-24, *infra*.

[5] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

age does not invite the same presumption of invidious discrimination.[6] Equally important, *Murgia* illustrates a way in which an age distinction can be drawn not "because of" age but to advance a governmental interest related to age.

Moreover, in 1996 Congress sanctioned a virtually identical age distinction for hazardous-duty employees by amending the ADEA to permit state and local governments to set mandatory retirement at age 55 for firefighters and law enforcement officers. *See* 29 U.S.C. § 623(j). Jefferson County does not have such a mandatory retirement age; instead, officers may either retire at age 55 or after 20 years of service, or continue working, as Lickteig chose to do. Ironically, it is precisely this generosity that has resulted in the EEOC's lawsuit alleging invidious age discrimination.

The permissibility of an age distinction, apart from 29 U.S.C. § 623(j) itself, can easily be demonstrated by imagining that Kentucky sets mandatory retirement for its officers at age 55. In that case, there could be no quarrel that the same age distinction that Kentucky uses now to calculate "disability retirement" would be nondiscriminatory under the ADEA. This is because an able-bodied officer who is retired at age 55 would not have the "opportunity" to become disabled at all, and thus could not allege disparate treatment in comparison to a younger disabled

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[6] Although the Court has indicated that the ADEA prohibits a broader range of conduct than does the Equal Protection Clause, *see Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81-86 (2000), this does not mean that age distinctions, which are "presumptively rational" under the Equal Protection Clause, *id.* at 84, are presumptively unlawful under the ADEA.

officer. Of course, "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984). The point here is that Kentucky's age distinction could unquestionably exist without incurring allegations of disparate treatment by the class of officers over age 55. There is nothing about an explicit age distinction, by itself, which evidences unlawful discrimination.

B. The Age Distinctions in Kentucky's Plan Do Not Discriminate "Because of" Age.

Kentucky's retirement plan is designed to provide an officer who becomes permanently disabled before she qualifies for normal retirement with "a retirement benefit that is roughly equivalent to what she would have earned had she worked up to the closest milestone of retirement eligibility." Pet. Br. 7; *see also* Pet. App. 33a (Boggs, J., dissenting) ("The plan simply provides that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service."). Without the use of the normal retirement age as a factor in the calculation of benefits, it would be impossible to project what an officer would have earned had she not become disabled.

Not only is Kentucky's plan based on benign motives, but older workers are not "adversely treated"

by the plan. The plan is a form of insurance that confers two related but distinct benefits for officers such as Lickteig engaged in hazardous employment: (1) the peace-of-mind benefit for officers (and their families) that comes from the assurance of income support in the event the officer becomes permanently disabled prior to reaching retirement age; and (2) the compensation benefit of the income support itself if and when a contingency (disability or retirement) is reached.

It is an axiom of insurance theory that not "only those who suffer loss and receive indemnity obtain any real benefit from insurance. . . . the promise to pay if a loss occurs may be fully as valuable as reimbursement after the loss." Albert H. Mowbray, *Insurance: Its Theory and Practice in the United States* 1 (3d ed. 1946). The value of insurance, therefore, cannot be measured only by the amount of compensation a policy promises, for if the insured-against contingency never occurs—for example, a house protected by fire insurance never burns down—then compensation is never paid; but it could scarcely be argued that the homeowner was not benefited by the insurance policy.

Nevertheless, the EEOC urges this Court to consider only the ostensible difference in compensation payouts.[7] This simplistic notion disregards the reality that the EEOC represents a class of officers who

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[7] It would be absurd to argue that a law enforcement officer does not benefit from disability coverage merely because she does not become disabled during the period of coverage, and *amici* do not understand the EEOC to be making that argument.

have already enjoyed the full peace-of-mind benefits conferred by disability coverage, and are now seeking to capture a surplus of compensation benefits under the theory that the same plan that once afforded them peace-of-mind benefits is now "unequal."

For example, a police officer who is hired at age 40 and works past normal retirement age enjoys 15 years of insurance protection against losing her livelihood due to disability. Following normal retirement age, retirement benefits are substituted for disability benefits, but this does not constitute "adverse treatment" of the class of older officers. Prior to disability, these officers continuously enjoyed the peace-of-mind benefit afforded by the very plan the EEOC now challenges. When the benefits of the plan are viewed across the time-span of employment, it is clear that "parity" cannot simply mean paying an officer like Lickteig the same amount of compensation benefits paid to pre-retirement officers. This sort of "parity" is impossible to achieve without reducing the level of insurance coverage—and thus peace-of-mind benefits—across the board.[8]

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[8] In this case, Kentucky has twice modified its retirement statute in response to this litigation, resulting in successively less robust disability coverage for its employees. *See* Pet. App. 8a-9a n.2. The 2000 version of the scheme provides that "an employee is not eligible for disability retirement benefits if the employee is 'eligible for an unreduced retirement allowance.'" *Id.* at 9a. This excludes the class of employees who qualify for normal retirement after 20 years of service. *Id.* The 2004 version of the statute calculates disability retirement benefits to be "the higher of twenty-five percent . . . of the member's monthly final rate of pay or the retirement allowance determined in the same manner as for retirement at his normal retirement date with years of service and final compensation

Put another way, the essence of the EEOC's claim of invidious age discrimination is the alleged discrepancy in monetary value of the insurance protection between older and younger officers. This contention is both reductionist and nonsensical. Because the plan calculates the disability payout for younger officers by projecting what the officer would have earned had she continued working until normal retirement age, it is meaningless for an officer over normal retirement age to claim entitlement to a benefit that is *defined* by the amount that the officer would have earned had she worked until normal retirement.

Kentucky's plan is nondiscriminatory in a second way, because an officer who chooses to work past age 55 is not facially excluded from any category of risk. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court considered a disability insurance plan that excluded pregnancy. While pregnancy is unique to women, the Court noted that there was no evidence "that the financial benefits of the Plan worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." *Id.* at 138 (internal quotation marks omitted).

In holding that the plan thus did not constitute gender-based discrimination, the Court further noted that the plan, provided to male and female workers, "covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is

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being determined as of the date of his disability." *Id.* at 8a n.2. Because no service credits are imputed under this calculation, the benefit payout is invariably less.

no risk from which men are protected and women are not.'" *Id.* at 138. Likewise, under Kentucky's plan, there is no risk from which younger officers are protected and older officers are not.[9] The plan does not exclude older officers from being insured against disability; both young and old officers are eligible to collect a retirement pension in the event they become disabled.

Kentucky's retirement plan, like the plan in *Gilbert*, "in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others." *Id.* at 138. And in fact, far from discriminating because of age, the plan seeks to compensate officers *in proportion* to their risk of loss. Younger officers simply have more to lose. The plan aims to compensate its officers accordingly.[10] This is not "because of" age, but because of the tragedy of becoming permanently disabled before accumulating a proportionate "life's worth" of benefits. Indeed, it would be highly irrational for an officer who becomes

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[9] In fact, "disability retirement" covers only the risk of disability, while "normal retirement" provides catch-all coverage for any risks short of, or beyond, disability as defined by statute. *See* Pet. Br. 7a. An officer over age 55 need only stop working voluntarily to receive benefits.

[10] Not only is the loss objectively greater for younger workers, but as the dissent below noted, the "very reasonable benefit" created by the plan is "one that a younger worker . . . would be more likely to value more highly than a newly-hired older worker, who would be more likely to have acquired other benefits from more extensive earlier employment." Pet. App. 33a (Boggs, J., dissenting). This Court has noted that the value of the benefit to the recipient is a relevant factor in determining whether two classes are similarly situated. *See Johnson v. Robison*, 415 U.S. 361, 382-83 (1974).

disabled at age 61 due to the aging process to envy the plight of a "similarly situated" 35-year-old officer permanently disabled in the line of duty simply because the 35-year-old receives a marginally greater dollar amount of retirement benefits.

It is therefore a fundamentally false comparison to say that an officer is "similarly situated" to a younger officer with the same years of service, because this comparison disregards the reality that the plan was designed to address—that "[a]ll else being equal, the non-disabled [younger employee] of course has more years to work and live than does [the older employee]." Pet. App. 31a (Boggs, J., dissenting). *See Hazen Paper*, 507 U.S. at 611 ("On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer.").

Finally, any possibility that Kentucky's use of an age distinction is arbitrary is foreclosed by the recognition by Congress that age 55 is a rational line to differentiate the risks related to law enforcement service. *See* 29 U.S.C. § 623(j); *see also Murgia*, 427 U.S. at 310-11 (recognizing the "general relationship between advancing age and decreasing physical ability to respond to the demands of the job"). While an officer over age 55 may be unusually susceptible to age-related risks, Kentucky need not pay for the extra cost of insuring those risks. Just as "pregnancy-related disabilities constitute an additional risk, unique to women . . . the failure to compensate them for this risk"—in this case, by not paying an identical dollar amount of retirement benefits to every disabled officer—"does not destroy the presumed parity of the benefits . . . which results from

the facially evenhanded inclusion of risks." *Gilbert*, 429 U.S. at 139.

Thus, age does not "actually motivate[] the employer's decision" in this case. *Hazen Paper*, 507 U.S. at 610. Rather, as is clear from the nature of the plan, petitioners' motivation is to provide adequate and appropriate coverage to the entire hazardous-duty work force, including law enforcement officers starting their careers.

The legal conclusion urged by the EEOC—that petitioners' retirement plan invidiously discriminates because of age—is irreconcilable with this Court's guidance that "a prima facie case . . . raises an inference of discrimination only because we presume these acts, *if otherwise unexplained,* are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577 (emphasis added). Here, the nondiscriminatory nature of the plan explains itself. Because the plan is neither based on discriminatory motives nor results in differential treatment for older workers, no inference of intentional discrimination can reasonably be drawn.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In The

Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY, AND JEFFERSON COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF STATE RETIREMENT ADMINISTRATORS ("NASRA"), THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS ("NCPERS") AND THE NATIONAL COUNCIL ON TEACHER RETIREMENT ("NCTR") AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*

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INTEREST OF THE *AMICI CURIAE*[1]

The National Conference on Public Employee Retirement Systems (hereinafter "NCPERS"), the National Association of State Retirement Administrators (hereinafter "NASRA") and the National Council on Teacher Retirement (hereinafter "NCTR") are national organizations focused on the preservation, growth and stability of public pension plans and funds. The decision of the Sixth Circuit Court of Appeals in *EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006) undermines and frustrates these goals.

NASRA is a non-profit association whose members are the directors of this nation's state, territorial and largest statewide public retirement systems. These systems hold more than two trillion dollars in assets that provide pension and other benefits to more than two-thirds of all state and local government

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[1] The parties have consented to the filing of this brief and letters reflecting that consent have been filed with the Clerk of the Supreme Court as required by Supreme Court Rule 37.2. Further as required by Supreme Court Rule 37.6, counsel certifies that this Brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae*, their members or undersigned counsel made a monetary contribution to the preparation or submission of this Brief. It should be noted that Robert D. Klausner, counsel of record for the Petitioners, is general counsel to *Amici*, NCPERS and NASRA. Mr. Klausner has also previously represented NCTR. However, he did not participate in the preparation or submission of this Brief or make any monetary contribution toward its submission or preparation.

employees. In addition to its membership, NASRA also has approximately 200 associate members. Associate members are private sector firms that work with governmental retirement systems.

Among other functions, NASRA maintains a standing survey of key characteristics of public retirement systems and maintains a clearinghouse of information and resources pertinent to public retirement administration and policy.[2]

The National Conference on Public Employee Retirement Systems ("NCPERS") is the largest national non-profit public pension advocacy organization, representing over 500 governmental pension funds having assets in excess of two trillion dollars. NCPERS was founded in 1941 to protect the pensions of public employees by representing public pension organizations on Capitol Hill, providing trustee education and providing essential pension information to trustees, administrators and public officials.[3]

The National Council on Teacher Retirement ("NCTR") traces its origins to 1924. NCTR became affiliated with the National Education Association in 1937. It has been an autonomous educational and

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[2] General information concerning NASRA as well as specific data regarding its activities can be found at its website, www.nasra.org.

[3] General information concerning NCPERS as well as specific data regarding its activities can be found at its website, www.ncpers.org.

advocacy organization since 1977. NCTR has 77 state, territorial, local and university retirement systems as members. These systems provide retirement benefits to over 16 million educational professional, non-teaching school employees and retirees. NCTR member funds are responsible for the management of $1.4 trillion in assets. NCTR maintains a professional staff who provide educational and management guidance to member funds. Likewise, NCTR provides a national forum for the discussion of issues of national and local concern to public educational employee retirement plans. NCTR regularly advises Congress, state legislatures and federal, state and local executives on the management and protection of member retirement systems and their funds. NCTR also assists member funds in the development and implementation of professional plan management and asset investment policies.[4]

The *Amici* regularly cooperate on joint educational and advocacy projects due to the identity of interests in preserving the integrity of state and local retirement systems and the common state law issues regulating these plans. All of the *Amici* are non-profit tax exempt entities under Section 501(c)(6) of the Internal Revenue Code.

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[4] General information concerning NCTR as well as specific data regarding its activities can be found at its website, www.nctr.org.

As the primary advocates for governmental retirement plans and the more than 25 million Americans whose financial security depends upon them, NASRA, NCPERS and NCTR have a direct stake in the outcome of this litigation. *Amici* and their member funds represent significant assets and millions of citizens which have an interest in this matter and will be adversely affected by the decision rendered by the Sixth Circuit *en banc* in this case. The Circuit Court's determination ultimately broadens the scope of the ADEA as it affects state and local governmental pension plans and will inevitably lead to additional litigation and concomitant expense in designing, preserving and protecting public pension funds. Likewise, as a result of the decision, member plans may be forced to modify or reduce retirement benefits to millions of public employees nationwide in conflict with state constitutional guarantees.

SUMMARY OF ARGUMENT

This Court has granted a Writ of Certiorari to determine whether the use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq*.

Amici file this brief in support of the Petitioner, the Kentucky Retirement Systems, and urge reversal of the decision of the Sixth Circuit on the following

grounds: (1) the decision of the Sixth Circuit will lead to instability in the design, management and protection of public retirement funds; (2) under the *en banc* analysis virtually all pension plans (as it relates to retirement or disability) would be "on their face" discriminatory solely because they contain a reference to "age"; (3) the Sixth Circuit's analysis is contrary to this Court's decision in *Hazen* and conflicts with decisions of other Courts of Appeals; (4) the decision has widespread adverse fiscal implications; and (5) the decision violates principles of federalism.

The decision of the Sixth Circuit ultimately forces the nation's state and local retirement systems to act at their and their systems' detriment based merely on the denial of the Motion for Summary Judgment.[5] This court, in reviewing this matter,

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[5] The EEOC originally filed an action for declaratory, injunctive and monetary relief on behalf of Mr. Lickteig and others similarly situated who were allegedly excluded from disability retirement due to age. Petitioner moved to dismiss the actions on Tenth and Eleventh Amendment Immunity grounds. The District Court denied the motion and the Court of Appeals affirmed. The parties then filed cross-motions for summary judgment. Petitioner asserted that the EEOC had not established a prima facie case and that any "discrimination" fell within the ADEA's statutory exceptions. The District Court granted the Petitioner's motion for summary judgment and concluded the plan was not facially discriminatory and noted that to so hold would be "illogical" as age was always a factor in retirement plans. The District Court also indicated that the court could not reach the result requested by the EEOC "without undermining virtually every retirement policy in existence." The Sixth Circuit affirmed the decision. Then on rehearing, *en banc*,

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should reverse that decision in order to forestall the otherwise inevitable adverse reaction of the states to the Sixth Circuit's decision. Further, as the Sixth Circuit *en banc* decision is contrary to this Court's analysis of "disparate treatment" cases under the ADEA and is in conflict with decisions of other circuits, the decision should be reversed.

ARGUMENT

1. THE DECISION OF THE SIXTH CIRCUIT WILL LEAD TO INSTABILITY IN THE DESIGN, MANAGEMENT AND PROTECTION OF PUBLIC RETIREMENT FUNDS.

There are more than 25 million working and retired state and local government employees in the United States. Retired public employees live in virtually every city and town in the nation (90% retire and remain in the same jurisdiction where they worked).

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the court reversed the district court's granting of the motion for summary judgment and remanded. In so ruling, the *en banc* court found that the EEOC had established a prima facie violation of the ADEA as the Kentucky plan was facially discriminatory and that no further proof of discriminatory intent was necessary or required. The *en banc* court, in part, based its ruling on its finding that the Kentucky plan excluded employees over age 55 from a particular benefit because of their age. The *en banc* court ignored evidence that the plan was organized around "years of service" and not age. The *en banc* court in so finding overruled its previous decision in *Lyon* and brought its decision into conflict with this court's decision in *Hazen*.

Active public employees comprise more than 10% of the nation's workforce and two-thirds are employed in education, public safety, corrections and the judiciary. Retention of experienced and trained personnel in these positions is critical to the continuous and reliable delivery of public services.[6] In fact, this is one of the reasons that public retirement plans offer generous disability retirement plans for hazardous duty jobs such as police officers and firefighters. This was one of the express purposes and goals of the Kentucky plan.

Public pension plans distribute more than $140 billion annually (an amount greater than the total economic output of 22 states) in benefits to nearly seven million retirees, beneficiaries and other recipients with an average pension benefit of roughly $20,400 annually. These payments are steady and continuous and provide a robust economic stimulus to local economies throughout the nation. Studies indicate that public pension funds and the benefits they distribute make important contributions to the local, state and national economies. Likewise, the assets of

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[6] Data and statistics obtained from NASRA and are generally available through its website at www.nasra.org. See generally the resources section of NASRA web site. The site also has available general statistics and studies regarding retirees and retirement systems across the nation. Additional information regarding retirees and their demographic was obtained and is available from data, reports, statistical abstracts and briefs contained within the U.S. census bureau website at www.census.gov.

these plans are an important source of liquidity and stability for the nation's financial markets.[7]

Further, while private sector plans are subject to federal regulation through ERISA, state and local governmental plans are creatures of state constitutional, statutory and case law. These governmental plans must comply with a vast landscape of state and local requirements as well as industry accounting standards. These plans are accountable to the legislative and executive branches of the state; independent boards of trustees that include employee representatives; and ultimately the taxpaying public.[8]

The Sixth Circuit's finding that a public retirement plan is facially discriminatory simply because it considers age as a correlating factor in its retirement benefit formula undermines the funding and benefit framework of the nation's public pension plans. These public pension plans, upon which millions of retirees and their beneficiaries depend, will be subjected to great instability as the decision will: (1) upset the actuarial assumptions on which the states make funding decisions; (2) lead to huge expenses in designing, managing and protecting these plans; (3) require fundamental constitutional and statutory changes in virtually every state in the U.S.;[9] and (4)

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[7] See, Footnote 6, *supra*.

[8] See, Footnote 6, *supra*.

[9] The Kentucky Retirement Plan at issue in this case has a retirement formula common to many public retirement plans.

(Continued on following page)

foster uncertainty in the national financial markets as the plans attempt to discern the status of the law and come into compliance with it.

The plan offers both "normal" and "disability" retirement. The plan in order to provide a meaningful disability retirement option imputes years of service to a disabled employee to allow him to qualify for normal retirement. This is not an approach novel to or limited to the State of Kentucky. An overview of retirement provisions throughout the nation indicates that many states have provisions which impute "service years" during disability retirement in order to allow the disabled worker to qualify for normal retirement benefits. See, for example, Indiana Code, 36-8-8-13.3(b) and (c); Michigan C.L.A. 38.23 and 38.556(2)(d); North Carolina G.S.A. Sections 135-1 and 135-5 *et seq.*; Pennsylvania C.S.A. Sections 5102 and 5704; Tennessee C.A. Section 8-36-501(c)(3). Thus, if the Sixth Circuit decision is not reversed or modified by this Court, states will be forced to immediately redesign, re-formulate and re-legislate their disability and normal retirement plans. If "imputation of service" is not a valid methodology or legitimate actuarial remedy, then it would be virtually impossible to provide any meaningful disability retirement for young workers (with a minimum amount of actual service years) and at the same time provide a meaningful normal retirement to older workers (with a minimum amount of actual service years). More importantly, the legitimate goal and objective of the State of Kentucky (and other state and local systems) to provide a meaningful disability retirement for hazardous duty personnel is frustrated if not destroyed. Likewise, the legitimate state end of attracting qualified personnel (whether young or old) to risky and dangerous professions which serve society and are of benefit to the general public is lost. Ironically, the Sixth Circuit's decision would clearly place older workers at a disadvantage and deny them benefits available to younger workers. This can not be the intended goal of the ADEA for retirement benefits.

2. THE USE OF "AGE" AS A FACTOR IN A RETIREMENT PLAN DOES NOT RENDER THE PLAN DISCRIMINATORY UNDER THE ADEA.

The *en banc* decision of the Sixth Circuit finds that the Kentucky retirement plan is "facially discriminatory" simply because "age" is a factor in determining eligibility for a disability pension under the plan.[10] The District Court and the Sixth Circuit on prior hearing had both refused to make a finding of facial discrimination.[11] The District Court in its granting of the Petitioner's summary judgment noted:

> In a retirement policy, age is necessarily a factor, as the very nature of such a program requires age considerations. In this disability retirement policy, retirement eligibility is a product of age and years of service. However, finding a retirement policy facially discriminatory merely because age is a factor in the plan is illogical, and the court will not do so now. While discriminatory intent may

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[10] The worker in this case (Mr. Lickteig) was already eligible for normal retirement benefits based on his age and accumulated years of service. There was no need for "imputation of service" years in order to qualify Mr. Lickteig for a disability pension as at the time of his disability he was already otherwise qualified for normal retirement benefits. Mr. Lickteig at the time of his disability was already over 55 years of age and had accumulated 17 years of service.

[11] The previous decision of the Sixth Circuit was vacated by the *en banc* decision. The vacated decision is included in the Joint Appendix, pp. J.A. 36 – J.A. 55.

> not be required to show that a statute is facially discriminatory, some indication beyond the fact that a retirement policy uses age and years of service in its retirement eligibility scheme is needed in this case. Without any such indication, the plaintiff is asking the court to hold that age cannot be explicitly referred to in a retirement policy without violating the ADEA, and the court cannot so hold without undermining virtually every retirement policy in existence.

Judgment and Order entered by the U.S. District Court for the Western District of Kentucky, Joint Appendix, pp. J.A. 24 – J.A. 35, p. J.A. 28.

The *en banc* ruling will in effect force retirement plans across the nation to review and re-design their retirement plans. Further, the review and re-design will be no easy task as (1) most pension plan benefits are guaranteed in the state's constitution;[12] and (2)

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[12] Many states have constitutional provisions protecting against diminishing, impairing, encumbering or diverting public sector retirement funds for any reason or purpose whatsoever. Based on a recent survey, approximately 25 states have some form of constitutional provisions protecting these public retirement funds or such protections have been otherwise legislatively or judicially created. See, for example, Michigan Constitution, Article 9, Sections 19 and 24; New Mexico Constitution, Article XX, Section 22; South Carolina Constitution, Article X, Section 16. Likewise, many states consider membership in a state employee retirement system as a contractual relationship subject to statutory and constitutional protections which may be judicially enforced. See, for example, Alaska Constitution, Article 12, Section 7; Arizona Constitution, Article 29,

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the plan can make no reference to age without such reference being deemed "facially discriminatory," making actuarial analysis virtually impossible.[13]

The Sixth Circuit's ruling threatens all pension plans, in as much as all use "age" as a factor in determining retirement eligibility. Clearly, the ADEA, even as amended by the Older Workers Benefit Protection Act of 1990 ("OWBPA"), permits the establishment of a normal retirement age.[14] Further, age is always a factor in establishing retirement eligibility, along with years of service and the kind or type of service rendered.

All pension plans must establish some criteria for retirement. Most commonly and logically, these are years of service (whether actual or imputed), age and rate of pay. There are simply not many other obvious and legitimate factors or considerations in establishing

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Section 1; Michigan Constitution, Article 9, Section 19. Thus, the *en banc* decision, if not reversed, may force major revisions to state constitutional and statutory schemes. To the extent that the decision affects or impairs the guaranteed contractual rights of retirement fund members, the states or funds would be subject to a multiplicity of suits by retirees or future retirees for impairment of these contractual rights and obligations.

[13] Actuaries engaged by the nation's pension systems can determine accurately the normal pension benefits to be received by the participants at normal retirement age. Disability retirements are not predictable by definition and are based solely on past statistical experience.

[14] The Act also preserves defenses for the retirement system including "reasonable factors other than age", seniority systems and to preserve a bona fide employee benefit as long as the cost to the system does not vary by age.

a bona fide retirement plan. The Court of Appeals ignored these actuarial realities and evidence that the organizing principle of the Kentucky plan focused on the employees' eligibility for retirement based on their actual years of service. Likewise, the Court of Appeals ignored the fact the State of Kentucky had designed its retirement system as an accommodation to the disabled worker to provide a full and fair retirement benefit which would be comparable to the benefit received had the worker not been disabled and been able to proceed to normal retirement. Under the Kentucky plan, all public employees with at least five (5) years of service are ensured of a retirement benefit when they are no longer able to work, without regard to their age. Finally, the Sixth Circuit ignored the fact that the plan was designed to serve a legitimate state goal and purpose of attracting and retaining qualified applicants in high risk public jobs such as police officer and firefighter.

The Sixth Circuit decision, if not reversed by this Court, may also open the floodgates to a multitude of claims which could cripple retirement programs. The EEOC in the case now under consideration has sought damages including back benefits with prejudgment interest dating to 1992. If the thousands of public pension plans nationwide are now subject to suit, literally billions of dollars of state and local pension funds will be at risk. Public pension plans should not be thrown open to scrutiny and found discriminatory simply because "age" is utilized as a factor in the plan. Clearly, the failure by this Court to

reverse this decision could have catastrophic and destabilizing results.

Ironically, the effect of the Sixth Circuit decision will be to harm older workers. Under the Kentucky plan at issue in this case, a hazardous duty worker is vested and eligible to retire after reaching age 55 with five (5) years of service. If Kentucky is forced to modify its plan and revert to a straight "years of service" formula, workers who begin work later in life will never receive a pension because from an actuarial standpoint it would be cost prohibitive to provide retirement benefits to all workers with five (5) years of service who retire at any age.

The Kentucky formula actually encourages the hiring of older workers, consistent with the congressionally stated purpose of the ADEA, because the older workers, even with limited service, can still receive a pension. Under a strict "years of service" formula (with no allowance for reference to age) it would be financially impossible to offer a lifetime pension to workers who begin service late in life, because it is not possible to offer a younger worker with five (5) years of service a similar lifetime pension.

This Court should consider the practical effect of the Sixth Circuit's decision, which is to eliminate pension benefits for millions of workers who begin public service late in life. This alone is reason enough for the judiciary to tread lightly in invoking any sweeping changes to the manner in which ADEA

cases and specifically "disparate treatment" cases are viewed and analyzed in dealing with public retirement systems. After consideration of the matter, *Amici* would request that this court reverse the decision of the Sixth Circuit *en banc*.

3. THE SIXTH CIRCUIT DECISION IS CONTRARY TO THE HOLDING OF THIS COURT IN *HAZEN*.[15]

The Sixth Circuit analyzes this case as one of "disparate treatment" not one of disparate impact.[16]

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[15] *Hazen Paper v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

[16] Under *Hazen*, in "disparate treatment" cases liability depends on whether the protected trait, i.e. age, actually motivated the employer's decision. In other words, the protected trait (age) must have actually played a role in and had a determinative influence on the employer's decision. In contrast, "disparate impact" claims under the ADEA may be established without demonstration of discriminatory motive or intent. See, *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). Disparate treatment and disparate impact cases are fundamentally different. As Justice O'Connor wrote in Hazen, this Court "has long distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." 507 U.S. at 607.

In the instant case, the EEOC has alleged a "disparate treatment" claim under the ADEA. Nonetheless, the Sixth Circuit has applied a "disparate impact" analysis to this "disparate treatment" claim. *Smith*, in which this Court first recognized *ADEA* "disparate impact" claims, recognizes that an employer has defenses in "disparate impact" cases and may base his decision or plan on "reasonable factors other than age." See, 29 U.S.C. § 623(f)(1). Even utilizing a "disparate impact"

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The Sixth Circuit *en banc* found the Kentucky plan to be "facially discriminatory" so that no additional proof of discriminatory intent or motive was necessary, as motive and intent were directly evidenced by the facially discriminatory nature of the policy itself. *See,* 467 F.3d at 578-579, 580-582. More importantly, the Sixth Circuit *en banc* decision holds that "an employer's intent to discriminate is directly evidenced by the employer's writing or adoption of a facially discriminatory employment policy."[17] 467 F.3d at 580.

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analysis, Kentucky put forth sufficient evidence to establish an RFOA defense, which evidence the Sixth Circuit erroneously disallowed or ignored.

[17] It is unclear from the Sixth Circuit *en banc* decision whether the burden of production, burden of proof or burden of persuasion in an ADEA "disparate treatment" case has been affected. Petitioners in connection with their Motion for Summary Judgment put forth sufficient evidence to demonstrate that there were legitimate "factors other than age" which were considered in establishing the disability and regular retirement plans and in establishing the participants' eligibility criteria and requirements. As Chief Judge Boggs notes in the dissent, age was merely a correlating factor in establishing eligibility, not the motivating factor. Despite this showing by Petitioners, the *en banc* panel held there was a "prima facie" showing of discrimination (which was apparently not rebutted by the Petitioner's evidence). Accordingly, the Sixth Circuit remanded the matter to the District Court for further consideration. To the extent the *en banc* decision may affect and upset long lines of decisions of other Circuits and this Court regarding available defenses, burden of proof, burden of production or the burden of persuasion in ADEA "disparate treatment" claims, this Court should reverse the holding of the Sixth Circuit *en banc* and clarify these issues.

The decision is in direct conflict with *Hazen* where this Court stated:

> in a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment to employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Hazen, 507 U.S. at 609 (citations omitted).

In this case, it appears that age was nothing more than an incidental or correlating factor. It was not the motivating factor for the Kentucky plan. As the District Court noted in its granting of Summary Judgment and dismissal of the EEOC complaint: "Again, age will always be a factor in retirement plans. The fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a mask used to hide discrimination."[18] For the Sixth Circuit to find

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[18] See, "Order" of the United States District Court for the Western District of Kentucky, filed September 3, 2003, Granting Kentucky's Motion for Summary Judgment and Dismissing the

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the plan facially discriminatory violates the "disparate treatment" analysis laid out by this Court in *Hazen*.[19]

Neither the intent nor the letter of the ADEA is violated by a retirement plan's reference to age when this is merely a correlating factor or an "actuarial reality." This court should reverse the decision of the Sixth Circuit *en banc* and ensure the decision conforms to its holding in *Hazen* and other "disparate treatment" cases under the ADEA.

4. THIS COURT SHOULD CONSIDER THE ADVERSE FISCAL CONSIDERATIONS WHICH FLOW FROM THE DECISION.

The Sixth Circuit in the instant matter seems concerned that Kentucky engages in the typical practice of not permitting persons who have already

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EEOC complaint. The "Order" is included in the Joint Appendix, pp. J.A. 24 – J.A. 35 and the quote is from page J.A. 32. See also, *Lyon v. Ohio Education Ass'n and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995) which found that imputation of service years in a retirement plan was not discriminatory but a reflection of an 'actuarial reality'. *Id.* at 140. The Sixth Circuit *en banc* decision which is now under review overrules *Lyon*.

[19] The Sixth Circuit *en banc* decision also favorably cites various cases from sister circuits as "mandating" its holding and overruling of *Lyons*. See, Joint Appendix, pp. J.A. 76 – J.A. 77. However, a close reading of those cases reveals that they are distinguishable on their facts and are not analogous to the case at bar nor do they "mandate" the decision of the *en banc* Court.

reached normal retirement age to receive disability benefits. Many plans nationwide actually convert disability retirees to normal retirement status upon attainment of normal retirement age, provided that no reduction in benefit payments occurs.

This practice is consistent with the purpose of disability benefits, particularly for public safety employees injured in the course and scope of hazardous duty. Without disability benefits, public safety officers injured on the job would be unable to survive financially until normal retirement age. Disability payments thus provide a needed bridge from active paid service to normal retirement.

The ADEA as amended by the OWBPA specifically permits states to establish a normal retirement age. Further, Congress has recognized that public servants in hazardous duty situations may have a lower retirement age than regular state employees and as a result has seen fit to eliminate the IRC Section 72t penalty for early withdrawal from retirement plans for public safety officers who retire after age fifty. For regular employees, the Congress has set normal retirement age for the 72t penalty at fifty-nine and one-half, or age fifty-five in the case of a separation from service.

Similarly the Congress has seen fit to tax disability benefits differently from normal retirement benefits. While the latter are generally taxable as ordinary income, the former are exempt from tax under IRC section 105. Forcing states to provide

disability benefits in lieu of normal retirement benefits after a worker reaches normal retirement age will have a direct negative effect on the public fisc, contrary to the express intent of Congress.

Thus, aside from the fiscal impact of the Sixth Circuit decision on the states, the decision affects the federal treasury as well.

5. THE SIXTH CIRCUIT DECISION VIOLATES PRINCIPLES OF FEDERALISM.

The ADEA defines an "employer" to include a state and a political subdivision of a state but not the United States. 29 U.S.C. § 630(b). However, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), this Court held that although Congress intended the ADEA to abrogate the States' Eleventh Amendment immunity, this abrogation exceeded Congress' authority under the Fourteenth Amendment. Specifically, this Court held that Congress could not impose certain substantive requirements on state and local governments when such requirements were disproportionate to any unconstitutional conduct which could be targeted under the ADEA.[20]

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[20] *Kimel* is an important decision in recognizing, upholding and furthering the principles of federalism. The decision centers on the Court's review of the Congressional intent and purpose in passing the ADEA and the power of Congress to abrogate the States' sovereign immunity under the Eleventh and Fourteenth

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Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), a 1989 decision of this Court, was legislatively modified by the OWBPA on the limited finding of Congress that younger workers could not be afforded a specific benefit which was not available to older workers. Contrary to the implied finding of the Sixth Circuit, OWBPA does not generally abrogate well established principles of federalism which discourage the federal government from interfering with the traditional police powers reserved to the states.

The decision of the Sixth Circuit turns federalism on its head and forces the states to show that their policies in the traditional area of state law enforcement do not violate non-binding guidelines issued by the EEOC.[21] This is an area which has always been

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Amendments to the United States Constitution. The Court ultimately held the ADEA's abrogation of state immunity invalid under Section 5 of the Fourteenth Amendment by disallowing suits against states by individuals under the ADEA in federal court.

[21] It is clear the EEOC has rule-making authority under the ADEA. However, rather than engaging in rule-making, the EEOC issues "guidelines" concerning the interpretation of and compliance with the ADEA. However, ADEA guidelines issued by the EEOC are only statements of EEOC policy and do not comply with the legal requirements for rule-making. The force and effect of such guidelines is merely a function of their persuasive effect. *Christensen v. Harris County*, 529 U.S. 576, 586 (2000). Further, no deference is due to agency interpretations at odds with the plain language of the statute itself. The EEOC has brought suit against Kentucky based solely on the EEOC's staff interpretation of an ADEA provision, in a transparent attempt to bully the

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strictly construed in favor of the states, and this Court has never gone so far as to abrogate state sovereignty in favor of a federal agency's guidelines which have not attained the force of law.

The Tenth Amendment to the United States Constitution confirms the state's status as a sovereign. In deference to the sovereignty of the state, the federal government can neither: "issue directives requiring the states to address particular problems nor command the state's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).[22]

Through its enforcement actions, guidelines and advisory directives, the EEOC has sought in this and other enforcement actions to dictate to the states how to design and structure their public retirement plans. This is an affront to federalism principles embodied in the Tenth Amendment to the U.S. Constitution. Likewise, the efforts of the EEOC undermine and

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sovereign State of Kentucky into adopting the EEOC's staff interpretation of the law, without any true law making, formal publication or opportunity for public comment. This is directly at odds with the proper functioning of our federal system.

[22] In *Printz*, this Court found that the obligation to conduct background checks imposed on sheriffs by a federal gun law (the Brady Bill) was unconstitutional as it required the states to administer a federal regulatory program. Specifically, the law was violative of the principles of dual sovereignty established and contained in the U.S. Constitution.

frustrate a vast array of state constitutional and legislative provisions specifically involved with the establishment, design, funding and maintenance of these public retirement systems. The employment and payment of state officers enforcing the plenary police powers of a state is paramount to the sovereignty of that state.

The power of a state to regulate its own citizenry and to regulate relationships with its own employees and retirees is essential element of our system of federalism. Congress recognized this in exempting public retirement plans from the scope of ERISA in 1974.[23]

Likewise, this Court should strictly scrutinize decisions expanding the scope and application of the ADEA to public retirement systems and particularly plan design and participant eligibility. The Sixth Circuit's *en banc* decision directly and wrongly permits the federal government to regulate the states in the provision of traditional police and fire protection to their citizens. The Framers of the Constitution would be appalled.

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[23] See, 29 U.S.C. § 1003(b)(1).

CONCLUSION

For the above and foregoing reasons, *Amici Curiae* urge that after consideration the decision of the Sixth Circuit *en banc* be reversed.

Respectfully submitted,

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No. 06-1037

In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.,
Petitioners

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MINN. STAT. § 122A.48 (2007) 7

MINN. STAT. § 465.72 (2007) 7

Rules:

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Miscellaneous:

Wisconsin Legislative Council, *2004 Comparative Study of Major Public Employee Retirement Systems* (December 2005) http://www.legis.state.wi.us/lc/publications/crs/2004_retirement.pdf ..... *passim*

U.S. Census Bureau, Economics and Statistics Administration, U.S. Department of Commerce, *Compendium of Public Employment: 2002* (September 2004) http://www.census.gov/prod/2004pubs/gc023x2.pdf ..... *passim*

Diane M. Juffras, *Early Retirement Incentive Programs: Are they Legal for North Carolina Public Employers*, PUBLIC EMPLOYMENT LAW (June 2006) http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/pelb33.pdf 4

Equal Employment Opportunity Commission Compliance Manual (Oct. 3, 2000) http://www.eeoc.gov/policy/docs/benefits.html#N_1_). 4

Education Commission of the States, *State Collective Bargaining Policies for Teachers*, StateNotes – Unions/Collective Bargaining (June 2002) http://www.ecs.org/clearinghouse/37/48/3748.pdf 8

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association ("NSBA") was founded in 1940 as a not-for-profit federation of state school board associations from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the over 95,000 school board members who govern some 14,000 local school districts employing almost 6.4 million people, collectively one of the largest public employers in the Nation.

NSBA's mission is to foster excellence and equity in public education through school board leadership. As part of its mission, NSBA is dedicated to the establishment of a reasonable interpretation and application of anti-discrimination laws that balance the rights of public school employees against the relentless fiscal challenges facing public schools. Benefit packages like those provided by the Kentucky Retirement System, as well as the thousands of retirement plans offered by school districts, including early retirement incentive programs, many of which are contained in collective bargaining agreements, represent a crucial means by which the interests of both employees and employers alike are

[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. S. Ct. R. 37.6. All parties have consented to the filing of this brief. Consent letters have been submitted to the Clerk.

served. That age may be a potential factor in the distribution of benefits to workers under these plans does not render such plans violative of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (2007) (ADEA) because the employer's decision is not motivated by age-based stereotypes and animus.

The Court of Appeals' *en banc* decision holding a retirement program facially discriminatory simply because age is a factor in the determination of benefits threatens thousands of public school district retirement benefit plans. If allowed to stand, the decision may adversely impact public school budgets and chill the collective bargaining process between school boards and labor unions.

SUMMARY OF ARGUMENT

The ADEA prohibits only arbitrary age discrimination. While age may be a correlative factor in the Kentucky Retirement System plan, as well as retirement plans used by public school districts, including early retirement incentive plans (ERIPs), these plans are not arbitrary as they are not based upon stigmatizing stereotypes or other age-based animus. ERIPs are commonly integrated into collective bargaining agreements, often at the urging of employee unions.

ERIPs provide employees with a special benefit or incentive to elect voluntarily to leave the workforce earlier than otherwise planned and through that election allow school districts to save much needed funds. Typically, employees near the top of the pay scale are the intended benefactors of ERIPs.

As a practical matter, these employees tend to be older employers for no other reason than it takes years to reach the top tiers of public wage tables.

School districts (and labor unions) utilize a variety of ERIPs to entice high wage earners to retire early. For example, Iowa school districts utilized a plan offering teachers with 10 years of continuous service $200 for each day of unused sick leave if they retired between the ages of 55 and 65. The Eighth Circuit found this type of plan discriminatory on its face because an employee over 65 was ineligible to receive the ERIP. *See Jankovitz v. Des Moines Ind. Comm. Sch. Dist.*, 421 F.3d 649 (8th Cir. 2005). The court rejected the school district's argument that the plan was not arbitrary age discrimination and instead was a "true incentive offered to give employees an opportunity to retire early." *Id.* at 653.

Another type of ERIP often found in collective bargaining agreements includes incentives intended to provide a means to pay for health insurance until the early retiree is eligible for Medicare. Mindful of this rationale, younger employees receive a greater benefit because they must wait longer before they become Medicare eligible. Although not based upon any age-based animus, courts have found these types of plans violative of the ADEA. *See, e.g., Overlie v. Owatonna Indep. Sch. Dist. No. 761*, 341 F. Supp. 2d 1081 (D. Minn. 2004).[2] Many school districts in several states continue to utilize similar types of ERIPs.

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[2] *See also Solon v. Gary Comm. Sch. Corp.*, 180 F.3d 844 (7th Cir. 1999) (holding ERIP violated ADEA despite school district's claim, in part, that declining benefit incentive provided "bridge" to eligibility for social security); *E.E.O.C. v. Hickman Mills Consol. Sch. Dist. No. 1*, 99 F.Supp.

Still other common early retirement incentives may include flat-dollar bonuses (e.g., $10,000 to employees electing early retirement), one-time termination bonuses (e.g., a percentage of final salary), length-of-service bonuses (e.g., $1000 for each year of service), imputing years of service under a retirement plan, or the purchase of service credit in the retirement system. *See Diane M. Juffras, Early Retirement Incentive Programs: Are they Legal for North Carolina Public Employers, Public Employment Law (June 2006)* *(http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/pelb33.pdf)*; Equal Employment Opportunity Commission Compliance Manual (Oct. 3, 2000) (http://www.eeoc.gov/policy/docs/benefits.html#N_1_) at ADEA Issues, Part VI.

ERIPs that contain provisions employing age, in part, as a basis to determine benefits, are far from arbitrary and capricious for the very fact that labor and management actively *bargain* for inclusion of these benefits. Yet it is public school districts, and the public monies provided to them, which are singled out by the Equal Employment Opportunity Commission ("EEOC") to "pay" for allegedly discriminatory (yet bargained-for) practices.

Despite the EEOC's enforcement efforts, unions have resisted the removal of ERIPs for the important reason that their members still want them because they facilitate early retirement. Employers do not object because ERIPs are intended to reduce

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2d 1070 (W.D. Mo. 2000) (holding ERIP benefits that decline after initial year of eligibility, which were based upon age and years of service, violated the ADEA).

labor costs and reward employees who have typically provided the districts with decades of service. The stark realities of dwindling public budgets, and public reluctance to approve more levies to make up operating costs, leave school districts desperate to reduce costs wherever possible. The common denominator substantiating the fairness of these plans is found in the desire for these programs by both unions and school boards, albeit for different, yet equally compelling, reasons.

The issue of whether the ERIPs described above and similar plans utilized by public school districts are consistent with the purposes of the ADEA, whether reviewed as a prima facie violation of the ADEA or as fitting within the early retirement exception, remains unresolved by this Court.

Concurring in an *en banc* Court of Appeals decision, Judge Rogers was careful to emphasize that the Court of Appeals "should make clear that . . . we take no position on whether the result in *Lyon*[3] can be supported by the early retirement exception to ADEA liability."[4] *EEOC v. Jefferson County Sheriff's Dep't*, 467 F.3d 571, 583 (6th Cir. 2006) (*en banc*). Judge Rogers explained that the Sixth Circuit's decision in *Lyon*, which the *en banc* Court in this case reversed, affirmed only the district court's finding

[3] *Lyon v. Ohio Educ. Ass'n and Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995), *overruled by EEOC v. Jefferson County Sheriff's Dep't*, 467 F.3d 571 (6th Cir. 2006).

[4] The "early retirement exception" referenced by Judge Rogers is codified at 29 U.S.C. § 623(f)(2)(B)(ii) (2007).

that the plaintiffs had failed to establish a prima facie disparate treatment claim under the ADEA. *Id.*[5]

NSBA urges this Court to reverse the *en banc* decision of the Court of Appeals and confirm that retirement plans like those in Kentucky and many public school district plans across the country may refer to age in the computation of benefits. Using age in this manner is fair and an eminently necessary part of a school board's fiduciary obligations in the expenditure of public monies.

ARGUMENT

A. EARLY RETIREMENT INCENTIVE PLANS ARE VOLUNTARY, FISCALLY SOUND, AND DESIRED BY EMPLOYEES.

Public school districts employ approximately 6.4 million people nationwide. Recent funding figures[6] indicate public school districts annually spend $455 billion on all programs (over 4½% of gross domestic product), including $215 billion for salaries

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[5] The ERIP in *Lyon* was included in a collective bargaining agreement. *Lyon*, 467 F.3d at 136. Similar to the plan in this case, the challenged benefit in *Lyon* involved an early retirement incentive that imputed years of service to eligible employees. *Id.* at 136-37. The Sixth Circuit rejected the plaintiffs' ADEA claim: "[T]he disparity that plaintiffs find objectionable is a product of their length of service and their age when originally hired []. Thus, any disparity merely reflects the actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age of 62 (the OWBPA allows employers to fix a minimum age for early or normal retirement). Since this factor was not being used as a "proxy" for age, it may not be considered evidence of discriminatory animus. *Id.* at 140 (footnote omitted).

[6] Fiscal Year 2003.

and benefits for teachers and instructional aides. Both enrollments and budgets are expected to increase at least through 2014. Growing budgetary shortfalls across the country are leading to difficult decisions involving sensitive cuts, including closing schools, increasing class sizes, shortening school days, increasing fees, freezing or cutting salaries, reducing or dropping certain non-core classes and programs, eliminating sports and other extra-curricular programs, outsourcing, reducing teacher training, eliminating technology improvements, taking commercial loans, reducing or eliminating transportation and maintenance projects, and eliminating teaching, counseling, administrative and other staff positions. States have also reduced per pupil funding and general education funding due to budget deficits at the state level. As a result, ERIPs represent more than a special benefit to employees. They allow school districts to save millions of dollars by providing voluntary incentives for high wage earner employees to comfortably exit the workforce.[7]

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[7] In some states, ERIPs have been statutorily authorized and for years have withstood the scrutiny of state courts. *See, e.g.*, Minn. Stat. §§ 122A.48 (2007) (early retirement incentives for teachers); 465.72 (severance pay to employees of county, city, township, school district or other political subdivision); *State by Beaulieu v. Independent Sch. Dist. No. 624*, 533 N.W.2d 393, 396 (Minn. 1995) (holding that section 465.72 reflected the Minnesota legislature's "broad grant of authority for school districts to manage their resources appropriately and ease employee transition out of the school district work force," including the authority to differentiate between employees whose ages qualify them for early retirement incentives and those who do not qualify).

The relationship between public school districts and their employees in approximately 33 states is governed by collective bargaining agreements (CBA).[8] The collective bargaining process is conducted in a collaborative manner whereby the parties make demands and offer concessions in an effort to reach a consensus on the terms and conditions that will govern the employment relationship. Interim agreements regarding particular issues are often memorialized in Memoranda of Understanding. The process culminates in the execution of a final collective bargaining agreement, incorporating each agreed-upon provision. When negotiating the details of some provisions, including ERIPs, union members may serve on board committees that function more collaboratively than traditional "at the table" bargaining. A CBA only becomes effective after being ratified by a majority vote of employees.

Public school districts and employee unions often bargain for retirement programs that utilize a combination of age and years of service in order to compute early retirement incentive benefits. In fact, most of the country's public retirement programs utilize formulas which use both age and years of service in the determination of retirement benefits. It is no surprise that after the forced removal of some ERIPs by the EEOC, labor unions commonly demand other benefits to replace the lost ERIPs. The

[8] *See* Education Commission of the States, *State Collective Bargaining Policies for Teachers*, StateNotes – Unions/Collective Bargaining (June 2002) (http://www.ecs.org/clearinghouse/37/48/3748.pdf).

reason is simple: Labor unions believe that ERIPs provide a valuable asset to workers.

The Sixth Circuit in *Lyon* provided a compelling explanation of the collective desire for ERIPs:

> Early retirement plans enable employers and workers alike to avoid involuntary layoffs by accelerating the pension process, and such plans have proven very popular with labor and management--it is no accident that an early retirement plan was negotiated into the collective bargaining agreement as a "benefit." Therefore, it should be expected that one effect of such a plan is to encourage workers to retire early rather than continue to work. This is precisely what each side bargained for in the labor agreement. The fact that it may, in effect, take a higher benefit to buy out a worker with more to lose (the worker with more time until retirement) does not alter the analysis.

Lyon v. Ohio Educ. Ass'n and Professional Staff Union, 53 F.3d 135, 139 (6th Cir. 1995), *overruled by EEOC v. Jefferson County Sheriff's Department*, 467 F.3d 571 (6th Cir. 2006).

In general, the purpose behind voluntary early retirement programs is to (1) reduce labor costs by replacing high income employees with lower income employees; (2) retain a mix of experience levels of teachers within the schools; and (3) provide incentives to teachers who voluntarily chose to retire

early. Moreover, teaching, like police work, can be a physically and emotionally demanding career. After teaching for a number of decades, teachers, like other workers, are often interested in pursuing second careers. ERIPs provide teachers the financial means to pursue other employment opportunities. As noted, early retirement incentive plans are voluntary, often created at the request of teachers.

Public school districts are generally mandated by state law to comply with CBAs, which are binding agreements, or risk litigation alleging unfair labor practices. The CBAs are agreements containing negotiated, and sometimes hotly contested, compensation systems. The status of a CBA as a contractual *agreement* is of significant consequence because it does *not* represent school board policy. As courts review CBAs, particular attention should be given to the context in which these agreements are negotiated and the intent of the negotiating parties. *See United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 567, 80 S.Ct. 1343, 1346 (1960) ("In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."). Judge Williams, dissenting from the majority's allowance of a reverse age discrimination claim in a recent Sixth Circuit case, summed up the proper deference that should be given to the collective bargaining process:

> Finally, this dissent is based on a common sense understanding of collective

> bargaining agreements. I am of the opinion that the ADEA was not intended to interfere with the collective bargaining process or with collective bargaining agreements. The courts should not stand watch over labor unions who represent employees of a company and interfere with their negotiations with employers.

Cline v. General Dynamics Land Systems, 296 F.3d 466, 476 (6th Cir. 2002) (Judge Williams dissenting), *rev'd* 540 U.S. 581, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004). Judge Williams further warned that the majority's holding "could have a devastating effect on the collective bargaining process, calling into question the validity of seniority and early retirement programs contained in collective bargaining agreements across the country. If such is allowed, bargaining for all workers, regardless of age, would suffer." *Id.*

The collective bargaining process provides the parties with the freedom to openly and freely haggle for desired benefits. The ability of the parties to engage in this process unencumbered is improperly restrained by unfounded allegations of age discrimination, especially when the parties are equally seeking benefits which are not driven by age-based animus.[9]

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[9] Instead of being driven by animus, public bodies strive to negotiate agreements that optimize the use of public funds, and unions strive to optimize the benefits for their members. At the end of the day, however, a collectively bargained for agreement is the result of a give-and-take process in which both parties are stakeholders, and should equally bear responsibility for the

If upheld, the *en banc* Court of Appeals decision will permeate the bargaining process, hampering the ability to negotiate in good faith in reliance on each others' public commitment to strike a bargain through collective efforts.

To the extent an ERIP or other retirement benefit where age may be a factor in the calculation of benefits is available in a CBA or otherwise offered by a school district, the arbitrary stereotypes Congress intended to abolish through the ADEA are not present. To the contrary, ERIPs save school districts money and provide desirous benefits to employees, neither of which is proscribed by the ADEA. Similarly, the Kentucky Retirement System benefits are compliant with the ADEA, although the intent of that plan is not to save money, but to provide a safety net to employees in the event of a disability. In neither case is there a belief that ability declines with old age — the evil the ADEA seeks to prevent.

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agreed upon provisions, including retirement benefits. Yet, due to a fundamental unfairness in the law, targeted ADEA defendants end up bearing the entire economic burden for plans found to violate the law. *See, e.g., Overlie*, 341 F.Supp. at 1088-91 (holding, in part, the ADEA and federal common law did not permit defendant school district to maintain contribution claim against third party defendant labor union) (*citing Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) and *Northwest Airlines v. Transportation Workers Union of Am.*, 451 U.S. 77 (1985)). Thus, public entities are twice vexed. First, after negotiating in good faith in order to reach a fair labor agreement, public bodies may be subject to ADEA liability. Second, in the event of ADEA liability, public entities cannot call upon a jointly responsible party—the union—in order that all interested parties share the responsibility for that liability.

Further, at least with ERIPs at the school district level, such plans are not forced upon high wage earners, but are voluntary, highly desirable, and openly bargained-for benefits. Surely, such an approach cannot offend the spirit of the ADEA. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (noting the essence of the ADEA is the prohibition of age discrimination on the false premise that with old age comes incompetence and faltering productivity).

ERIPs are *voluntary* plans that provide workers, if they choose, the option to retire early. Employees that desire to continue working may do so, in which case they continue to collect their full wages and benefits. The traditional wrongs the ADEA is designed to address are not present in these plans: age is not the motivating force of the employment decision, although age may be a factor in the computation of benefits.

As explained by Judge Boggs in his well-reasoned dissent rejecting the EEOC's position, this Court has held, "under the ADEA, companies could make a decision based solely on the need to save money, even if that decision bore more heavily, on average, on older workers, so long as the factor relied on was only correlated with age, not determined by age." *Jefferson County Sheriff's Dep't*, 467 F.3d at 585 (Judge Boggs, dissenting) (*referring to Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)).

The reasonable solution in this case, one which is consistent with the mandates of the ADEA and fairness to the bargained-for desire of public employees, is to reverse the Court of Appeals and

embrace the rights of public employers *and public employees* to agree that a variety of factors in the computation of retirement benefits may be used, including age and years of service.

The retirement plan at issue in this case, as well as the plans available to thousands of public school employees throughout the Nation, are consistent with the ADEA because they do not deprive older workers "of employment on the basis of inaccurate and stigmatizing [age-based] stereotypes." *Jefferson County Sheriff's Dep't*, 467 F.3d at 585 (Judge Boggs, dissenting).

B. THE ADEA PROHIBITS ONLY ARBITRARY AGE BASED EMPLOYMENT DECISIONS.

Congress has declared that the purpose of the ADEA is to:

> promote employment of older persons based on their ability rather than age; *to prohibit arbitrary age discrimination in employment*; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b) (2007) (italics added). Section 623, subd. a(1) further states that employers may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (2007).

In a disparate treatment case, as with the instant matter, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co.*, 507 U.S. at 610. "[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.*

"Disparate treatment," the Court continued, "captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Id.* "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.*

A retirement benefit is just that, a benefit. In many cases, benefit packages are negotiated and ratified by employees for the benefit of employees. They provide an enhancement to retirement security, smooth the transition from the workplace, and ease the financial burden on public employers of high wage earners. Neither the Kentucky plans at issue nor the retirement benefits commonly seen with public school districts embody provisions which compute benefits under formulae designed to eliminate older workers because of old-age falsehoods.

In summary, retirement benefits in which age may be a factor are not arbitrarily discriminatory *per se*. To hold otherwise threatens essentially every public retirement program, as they nearly univer-

sally base eligibility, in some manner, on age. *See United Airlines v. McMann*, 434 U.S. 192, 207, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977) (White, J., concurring) (noting "all retirement plans necessarily make distinctions based on age . . .")

CONCLUSION

The *en banc* decision of the Court of Appeals should be reversed, and the opinion of the District Court affirmed.

Respectfully submitted on this 13th day of November 2007.

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